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Hearing Room,
Federal Trade Commission,
Washington, D. C.,
July 22, 1947.

Before:

J. W. Norwood, Trial Examiner.

Appearances:

Edmund T. Wood and Richard Sewiss, American Building, Cincinnati, Ohio, representing Eagle-Picher Company and Eagle-Picher Sales Company.

E. Z. DuBose, 120 Broadway, New York, New York, representing National Lead Company.

3323 Henry E. Gardiner, 25 Broadway, New York, New York, representing Anaconda Copper Mining Company and International Smelting & Refining Company.

James T. Welch, 815 15th Street, N. W., Washington, D. C., representing The Sherwin-Williams Company.

Joseph S. Wright and Paul R. Dixon, appearing for the Federal Trade Commission.

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PROCEEDINGS.

Trial Examiner Norwood: The hearing will come to order.

Pursuant to adjournment on June 19, 1947, the hearing in Docket 5253 is now convened in Room 332, Office of the Federal Trade Commission, Washington, D. C., at 10 o'clock a. m., City Time, July 22, 1947.

Appearances are as follows:

Joseph S. Wright and Paul R. Dixon appearing for the Federal Trade Commission.

Edmund T. Wood and Richard Sewiss appearing for Eagle-Picher Company and Eagle-Picher Sales Company.

E. Z. DuBose appearing for National Lead Company.

Henry E. Gardiner appearing for Anaconda Copper Mining Company and International Smelting & Refining Company.

James T. Welch appearing for the Sherman-Williams Company.

I have laid out to furnish counsel a tentative statement of the issues here, both on Count 1 and Count 2, and have also made a short synopsis or outline of the complaint, stating the various charges and what I consider to be the logical order.

In respect to these charges, unless we make some changes pursuant to suggestions and criticisms from counsel, I shall treat this matter in this order in my report. I
3325 shall be glad to have suggestions along that line.

There is just one page here of tentative issues, and I think that we should settle those issues very soon. I should like to have any suggestions or any objections from counsel as to what the issues ought to be, or I would like to have them tender the issues to me; that is, such issues as they think should be considered.

Mr. Wood: If Your Honor please, could we have about five or ten minutes to look that over, because I would like to see how my own proposed testimony is going to fit within the framework of the issues as you have framed them.

Trial Examiner Norwood: Yes, you may have a recess.

(A short recess was taken.)

Trial Examiner Norwood: Are you ready to go ahead?

Mr. Wood: Yes.

Trial Examiner Norwood: All right, proceed.

Mr. Wood: I am going to make a very brief statement of the defensive position of the Eagle-Picher Company.

It is the charge of the bill of complaint that there has been a matching of prices among the producers of lead pigments throughout the country, and that as a result of that there has been no competition in the sale of lead pigments.

The record so far shows that these pigments are sold in general at recognized and fixed levels above the price
3326 of pig lead, and that the prices of the various companies in general have tended to be about the same at about the same time. That situation permits two possible inferences: One, that there is a price fixing conspiracy; two, that it is a type of industry in which price leadership exists. The Commission asserts the former, that it is a price fixing conspiracy; we assert that it is an industry in which price leadership exists.

Now, since there is no direct testimony, and everything is a matter of inference, we propose to show that there is very keen competition in the sale of lead pigments generally, and particularly between Eagle and National; that Eagle is competing very actively and very successfully with National in the sale of lead pigment, and that therefore that is evidence that there is no price fixing conspiracy. If there were a price fixing conspiracy, you would not have this keen competition which exists in the industry.

The nature of that competition was competition in value of the product delivered as distinguished from sheer price war. Eagle-Picher is in this position: Being the smaller of the companies, the less powerful, as alleged in the complaint, Eagle-Picher is not in a position to start a price war with National but does compete by the effort to give greater value in the product sold.

The products are not the same, they are different.
3327 Eagle-Picher custom cuts its product for the particular needs of the customer and has a very extensive research and technical sales service. It endeavors to give the customer the better job.

It is as if you were buying a suit and two tailors had the same quality wool suit at the same price but in one case they just sold you a suit of wool, "Take it," and in the other case there was a man that would pick out the model that was best suited for you, make alterations, and if necessary give you a custom cut coat. We say there is no matching of values there. The values are different even though the price is the same.

Now, to use another analogy, we admit that all products such as red lead or white lead in oil, Eagle-Picher has not been engaged in a price war with National but we say that General Stonewall Jackson's flank maneuver at Chancellorsville was just as much a military operation as Pickett's frontal charge at Gettysburg. We have not directly assaulted the entrenched position of National, but we have been carrying on what you might call a flanking attack, and succesfully, over a long period of years by the means suggested.

That is going to be the substance of the testimony

Trial Examiner Norwood: Call your witness.

Mr. Wood: Mr. Goetz.

Trial Examiner Norwood: Give us your full name,
3328 please.

Mr. Goetz: Alvin C. Goetz.

ALVIN C. GOETZ was thereupon called as a witness on behalf of respondent Eagle-Picher Company and, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Wood.

Q. Will you please state your residence and occupation, Mr. Goetz?

A. I live in Cincinnati, Ohio. I am the manager of the Technical Service Department of the Pigment Division of the Eagle-Picher Company.

Q. Will you please state your education?

A. I have a B.S. Degree in Chemistry from the Pennsylvania State College.

Q. What year?

A. 1915.

Q. Do you have any other degrees?

A. I have no other degrees.

Q. Are you a member of any technical societies or learned societies?

A. I am a member of several societies.

Q. What are they, please?

A. The American Chemical Society; I am a Fellow in the American Institute of Chemists; I am a member
3329 of the American Society for Testing Materials; the American Institute of Technical Engineers; the Federation of Paint and Varnish Production Clubs; the Chemical Market Research Group and also the Technical Group.

Q. Apart from the Eagle-Picher Company have you had in the past any positions on the boards or committees or anything like that in the lead industry?

A. I have served in a number of instances; I served in a technical advisory capacity on the Lead Industry Association Affairs regarding pigments. I also served, in the period from 1941 to 1945, as a dollar-a-year consultant to the Protective Coatings branch of the War Production Board, and also served as a per diem expense consultant for a six months period beginning late in 1946, and as a consultant on paint for the Public Roads Administration.

In addition to that I have been continually consulted by various Government persons interested in paint, both in the use and in the writing of specifications.

Q. After leaving college what did you do?

A. After leaving college I became the chemist of Kellogg & Miller, linseed oil manufacturers in New York.

Q. How long were you there?

A. I was there from approximately June, 1915, until August, 1917.

Q. What did you do then?

3330 A. In approximately August, 1917, I entered the Armed Forces, Officers' Candidate School at Fort Niagara, New York.

Q. What did you do after leaving the service?

A. After leaving the service I was engaged temporarily by the Bureau of Fisheries to investigate the economic position of fish meal and fish oil on both the East and West Coasts with a view to improving the quality, et cetera.

Q. What was your next position?

A. I then became manufacturing chemist in the by-products department of the Southern Cotton Oil Company at Savannah, Georgia.

Q. How long did you stay there?

A. About two or two and a half years.

Q. What was your next position?

A. My next position was superintendent of the fatty acid plant engaged in the production of steric acid, red oil and pitch for Darling Company in Chicago.

Q. How long did you hold that position?

A. Approximately two years.

Q. What position did you have after that?

A. That brings us up to 1923 when I became associated with the Eagle-Picher Company in Chicago, Illinois.

Q. Have you been connected with the Eagle-Picher Company continuously since 1923?

A. Continuously since 1923 to date.

3331 Q. What was your first position with the Eagle-Picher Company?

A. My first position was as a technical salesman.

Q. Selling what products?

A. Selling all of our lead and zinc pigments.

Q. How long did you remain a technical salesman?

A. I remained a technical salesman from 1923 through to 1939.

Q. What was the change of position in 1939?

A. In 1939 I was transferred to the home office in Cincinnati to take charge of a newly formed technical service department.

Q. What was the newly formed technical service department?

A. The object of that department, or my duties?

Q. The object of the department first.

A. To keep the pigment division fully informed on all technical development concerning its welfare and also to attend technical meetings and investigate technical subjects and work in a technical service way with the industry in the development of the use of our products.

Q. While you were technical salesman did you have any contact with the Eagle-Picher Research Laboratory?

A. Did I have contacts?

Q. Yes.

A. Yes, continual contacts.

3332 Q. What was the purpose of the contacts?

A. To keep the Research Laboratory informed in detail as to technical developments and to work out research projects more particularly concerning protective coatings, and still more specifically what we know as paint.

Q. What in general was the scope of the activity of the Research Laboratory in so far as the selling of pigments was concerned? Just generally, Mr. Goetz.

A. That may be divided into two parts, what we call our sales service where problems come in from the users of our pigments, and the second part where we are engaged in the investigation work as to improvement in the use of our products, in the manufacture of paint, for example.

Q. What sort of salesmen do you employ in the pigment division of Eagle-Picher Company?

A. At the present time, and as long as I can recall, all of the pigment division salesmen have been either chemists, chemical engineers or electro-chemists.

Q. What is the purpose of employing men of that degree of technical qualification?

A. To give our customers the best service possible in the use of our products and to improve the quality of their own products.

Q. In giving customers service can you give us in a little bit more detail what sort of service you give the customers?

3333 A. For example, a paint customer might say, "Look over my paint for me, will you? See how you think it stacks up with competition today." We would

look over his paint formula. We might suggest, for example, "You are a little low in hiding power, you ought to put in a little more of the high hiding pigments." We might say, "You have too much oil present." The customer might say, "Very well, but how do you know that?" So we refer to our several thousand exposures, both in effect at the time and the record from previous work and determine what he might expect in the way of performance in his paint from the changes which we suggest.

There are a great many errands to run. Oftentimes a person doesn't understand a Federal specification, for example, and our salesmen sit down with him and study out the specification and explain to him how to meet it.

Q. You referred to exposures. I would like to hand you a document which is marked for identification as Respondents' Exhibit 184-A through 184-D, and ask you if you can tell us what this document represents?

A. You asked me if I recognize these pictures?

Q. I ask you if you can tell what that exhibit represents?

A. This is a rather brief resume or outline of our test fence exposure where we study the performance of paint and the effect of changes for the benefit of ourselves
3334 and for the benefit of the trade, both on wood surfaces and on metal surfaces, and with several exposures, atmospheric and submerged.

Q. What do you mean by test fence? Explain in a little bit more detail, please.

A. In a study of paint it is rather costly and laborious to paint a house, for example, or a structure with a new paint. Usually in an important study there are many variables but so arranged that there is no conflict. There is only one variable made in a series at a time. Rather than engage 500 or 1000 houses which would be quite impractical, we use what are called panels which may be flat boards on the order of six to twelve inches wide and ten to eighteen or twenty-four inches long, or simulated siding of houses made up from clapboards. It is a much handier way and much cheaper.

Following our study of the performance of paint on these panels the next step is to separate the good from the bad and proceed by testing on a full scale structure like a residence.

Q. What is a test fence? You used the term "test fence".

A. We use the term "test fence" because of the manner in which the panels are exposed, which looks like a fence. For example, in this picture (indicating).

Q. Well, you are referring to the top picture on the page marked A there?

3335 A. The top picture on B.

Q. How large would that fence be, for instance? Can you give us some idea?

A. The fence would vary from 50 to 100 feet long. The space on which the panels are placed would be from 4 to 5 feet high, and a site would contain any number most of such fences.

Q. Well, for instance, can you give us an approximate idea of the size of your test fence at Joplin, Missouri?

A. We have a number of such structures to accommodate in the order of 5000 panels.

Q. Now, to whom does the information which you obtain from your test fences go?

A. Ultimately to the paint manufacturer.

Q. What is the purpose of giving that information to the paint manufacturer?

A. To help him make better paint.

Q. And what does your company get out of that?

A. Our company hopes that if we help the paint manufacturer to make a better paint, either maintain the same quality at a lower price or to make some special paint we hope that he is going to be good enough to remember us when he buys his pigments.

Q. To whom is this technical service available?

A. Our technical service is available to all of the

3336 industry and the Government, both Federal and State services.

Q. Is it limited strictly to your customers?

A. We have no restriction to customers. We may do more work for some one person than another, but that is because he may have more requirements or ask that more be done. Some requests are very simple. Some take a lot of time and labor.

Q. You spoke of the Research Laboratory developing special pigments. What is the purpose of developing special pigments?

A. One example might be that a paint manufacturer wishes to change his formula, for some reason or other, whereby he uses a pigment which we don't manufacture,

and that upsets his formulation. It may reduce the body and viscosity of his paint. We have to investigate and give him one of our pigments of such a nature that he will maintain the desired body in that paint.

He might also wish to reduce the cost of his paint by using some other type of pigment, or a different proportion of pigments.

Q. For how long a period of time have you been familiar with the so-called paint industry?

A. Since 1915.

Q. Now, in 1915, what was the position as to importance of basic carbonate white lead in the paint industry?

3337 A. I will have to ask you to repeat that question.

Trial Examiner Norwood: Read the question.

(The question was read.)

The Witness: In 1915, basic white lead carbonate occupied a very important place in the paint industry. White lead was the keystone of all exterior paint.

By Mr. Wood:

Q. Well, was white lead used just for white paint, or also for colored paints?

A. White lead is used in the manufacture of white and most tint paints, but not dark shades such as deep browns, maroons, and so forth.

Q. What was the attitude of the industry in 1915 in respect to other substances that were put into paint with white lead?

Mr. Wright: Objection, Your Honor. It hasn't been shown that this witness had any connection with this industry in 1915. As a matter of fact, he had just graduated from college at that time, and was employed in a linseed oil plant, as I recall his testimony.

Mr. Wood: I asked him directly when he became familiar with the paint industry, and he said in 1915. I don't care whether it is exactly 1915, or when it is, but linseed oil is one of the important items in the paint industry.

Trial Examiner Norwood: Read that question.

3338 (The pending question was read.)

Trial Examiner Norwood: Do you know that attitude?

The Witness: I do.

Trial Examiner Norwood: You may tell us. The objection is overruled.

By Mr. Wood:

Q. Will you please state what it was?

Mr. Wright: Your Honor—

Trial Examiner Norwood: Do you want to make a further statement?

Mr. Wright: I would like to make a further statement about it. I did not realize until now that he was being called as an expert witness on the attitude of the industry back at that time, and I submit that the qualifications that have been spread on the record don't show him to be such an expert witness as to testify as to what the attitude of the industry was at that time, because he had no connection with the industry at that time by his own testimony.

He graduated from college in 1915, and went with the Linseed Oil Plant, where he stayed for two years. From there he went to the Bureau of Fisheries, working on fish meal. His connection with the paint industry didn't begin until 1923, by his own testimony.

Mr. Wood: But the linseed oil industry is a part of the paint industry, Mr. Wright.

3339 Trial Examiner Norwood: I think you will have to lay the ground for that. I misunderstood the question there.

Mr. DuBose: He stated he knew of his own knowledge what the situation was, and I think Mr. Wright's objection goes to cross-examination and to the weight.

Mr. Wright: The question called for an expert statement as to what the opinion of the industry was at that time. It cannot be anything but a conclusion.

Trial Examiner Norwood: I will reverse my ruling and sustain the objection until further grounds are laid.

By Mr. Wood:

Q. Now I will relate my question to the period commencing in 1923, when you went to the Eagle-Picher Company, or whenever thereafter you became thoroughly familiar with the paint industry, and I will ask you whether or not you knew or learned in the period following 1923 the attitude of pigment purchasers who were paint manufacturers in respect to materials other than basic carbonate white lead which were mixed with basic carbonate white lead?

A. Well, the general attitude of the paint industry at that time was—

Mr. Wright: Excuse me, Your Honor. That question asked if he knew that.

Trial Examiner Norwood: That is right.

3340 By Mr. Wood:

Q. Answer yes or no first, whether you knew the attitude?

A. You are asking if I did or do know the attitude of the industry at that time?

Q. Yes.

A. I do know the attitude of the industry at that time.

Q. Will you please state what it was?

Trial Examiner Norwood: He asked about the attitude of purchasers, also. Do you know that?

The Witness: I do.

By Mr. Wood:

Q. In fact, you were engaged in selling pigments to purchasers at that time, weren't you?

A. That is correct.

Q. What was the attitude?

A. The attitude of the paint industry at that time was to use materials which had been used for a number of years; namely, white lead, zinc oxide and inerts in white and light tint paints. New pigments at the time were received with some reserve.

Q. That goes far enough in answering the question, Mr. Goetz.

Now, in 1923, when you commenced selling lead pigments for Eagle-Picher, what position did basic carbonate white lead occupy in the paint industry?

3341 A. At that time basic white lead carbonate occupied a dominant place in the industry.

Q. Do you know for how long it had occupied the dominant position?

Mr. Wright: Objection, Your Honor. It obviously calls for a conclusion, or hearsay on the part of the witness.

Trial Examiner Norwood: He asked if he knows. Answer that yes or no.

By Mr. Wood:

Q. Do you know the position?

A. The position of white lead in the industry at that time?

Q. Yes.

A. At that time, white lead occupied a very strong position, and furnished the bulk of white lead for paints.

Q. Now, in the answer to the previous question you used the term "dominant position." Could you explain just what you mean by dominant position?

A. By dominant position I mean that in 1923, when paint was formulated, the first thought was given to how much white lead could be used in the paint. That being determined, the other pigments in the formulation were adjusted to meet that white lead content.

Q. Do you know what formulation was considered the best outdoor paint in 1923?

3342 A. In 1923, 65 percent white lead, 25 to 30 percent zinc oxide, and approximately 10 percent inerts was considered a good paint in whites and light tints.

Q. Was a pure basic carbonate white lead paint considered better?

A. No, not considered better with basic white lead carbonate so long as some white lead was present.

Q. What is meant by the term "mixed paint"?

A. Mixed paint is the type of paint which one buys in the ordinary paint store all ready for use after stirring in the can.

Trial Examiner Norwood: That contains the oil and pigments?

The Witness: Everything is mixed ready for use.

By Mr. Wood:

Q. Do you know how a painter makes paint from white lead and oil?

A. I do.

Q. How?

A. He breaks up the white lead and oil, and usually allows it to stand or ripen. To any given quantities of that so-called shop lead, he adds additional linseed oil, thinner and dryer. Sometimes it is broken up directly on the job without first having gone into the form of shop lead.

Q. Does he add inert pigments or anything like that?

3343 A. Very rarely.

Q. Why is that?

A. Because the product has been used many, many years in that particular form, and there is no necessity

for adding any other material, with one exception. Sometimes a little zinc oxide is added.

Mr. DuBose: May we have a recess, Your Honor?

Trial Examiner Norwood: Are you nearly through with this witness?

Mr. Wood: No.

Trial Examiner Norwood: We will take a five-minute recess.

(A short recess was taken.)

Trial Examiner Norwood: Proceed.

By Mr. Wood:

Q. In 1923 what was the relative demand for a pure basic carbonate white lead in oil paint in relation to a mixed paint?

A. In 1923 the demand for the straight white lead paint, as we call it, was still relatively high. Subsequently, however, along about 1924 the demand became drastically less.

Q. What has been the trend between then and the present time?

3344 A. The trend has been distinctly toward the so-called ready mixed paint, the white lead in oil having just about held its own, whereas the ready-mixed paint production has increased manyfold.

Q. Now, is ready-mixed paint in competition with the pure basic carbonate white lead in oil paint?

A. In direct competition.

Q. How many types of white lead does the Eagle-Picher Company manufacture and sell?

A. Two types of white lead, basic white lead sulphate and basic white lead carbonate.

Trial Examiner Norwood: What is the difference between them?

The Witness: The difference is in chemical composition. The sulphate is a basic sulphate having the formula of PbO—PbSO4 and the carbonate $Pb(OH)_2.2PbCO_3$.

By Mr. Wood:

Q. I hand you a copy of the National Paint Dictionary, Second Edition, and direct your attention to the definition of white lead appearing on page 131, and ask you to read that definition into the record, please.

A. Read it aloud?

Q. Read it aloud into the record.
A. "White lead—"
Mr. Wright: Just a moment, please. I am going to object to that unless I can have an opportunity to see
3345 what is being read.
Mr. Wood: Let Mr. Wright read it first. It is just a formula.
The Witness: "White lead: 2 $PBCO_3.Pb(OH)_2$ or $PbO.PbSO_4$. The most widely used pigment in the paint industry, and sometimes incorrectly referred to as basic carbonate of white lead. It has excellent wettability with linseed oil and other drying vegetable oils, and produces a paint which exhibits excellent brushability in actual application. It is characterized by a high specific gravity and a very low absorption (7.0 to 11.0). White lead is now understood to mean either basic carbonate of white lead or basic sulphate of white lead. However, the term originally was used to indicate only the basic carbonate of white lead."

By Mr. Wood:

Q. What is the date of the dictionary from which you are reading?
A. July, 1942.
Mr. Wood: I call Your Honor's attention to the fact that paragraph 4-a, Count 1 of the amended complaint in the case reads:
"A. Lead pigments: This term includes the lead pigments commonly known in the industry as white lead
3346 (both basic carbonate and basic sulphate of lead)."
I was simply putting in the dictionary definition, Your Honor, to clarify the difference between the products.

By Mr. Wood:

Q. Now, is the basic sulphate white lead in competition with the basic carbonate white lead?
A. It is in direct competition with the basic carbonate of white lead.
Q. Is the basic sulphate white lead sold ground in oil the way basic carbonate white lead is sold?
A. To a very small extent.
Q. How is the basic sulphate white lead sold?
A. Almost exclusively in the dry powder form.

Q. To whom is the basic sulphate type of white lead sold primarily?

A. Almost the entire production in the order of 95 or a higher percent is sold to mixed paint manufacturers.

Q. And are their products in which they use that basic sulphate white lead in competition with the pure basic carbonate white lead paints made from white lead in oil?

A. They are in direct competition.

Q. What are the relative merits of the paints made from basic sulphate white lead and basic carbonate white lead?

A. There is no practical observable difference.

Trial Examiner Norwood: Read the question, please.

3347 (The question was read.)

The Witness: I assume you mean multiple pigment paints.

By Mr. Wood:

Q. Explain what you mean, Mr. Goetz, amplify your answer by stating just what you mean.

A. I mean used in a mixture with other pigments in the form of ready-mixed paint, ready for application as it comes in the package.

Trial Examiner Norwood: What is the basis then of the competition between the two?

The Witness: The Eagle-Picher Company feels that basic white lead sulphate produces a better paint and has exported the pigment to an infinitely greater extent than any other manufacturer of that particular pigment, because we think it gives the paint manufacturer a product with which he can make a good paint.

By Mr. Wood:

Q. Which is the more expensive of the two types of white lead?

A. The basic white lead carbonate sells at a somewhat higher price than the basic white lead sulphate.

Q. You stated in your answer to a previous question that the Eagle-Picher Company exploited the basic sulphate type of white lead. Why is that?

3348 A. Because for economic reasons the Eagle-Picher Company is in a better position to manufacture basic white lead sulphate than competitors are.

Q. What is the basis of that statement?

A. Because our plant is located in the mining area, the

Tri-State area, very convenient to our source of ores, whereas in the case of carbonate it is necessary to bring in pig lead from which the basic white lead carbonate is made.

Q. Where do you get the pig lead from which the basic white lead carbonate is made by Eagle-Picher?

A. From smelters and refiners who generally sell that type of material.

Q. From what material do you manufacture your basic sulphate white lead?

A. That is manufactured by two methods. Our production is almost entirely made from lead or concentrates. It can be made, however, by so-called wet or precipitation processes, but that is not the general practice.

Q. What is the wet or precipitation process?

A. That is a method whereby one starts with litharge which was previously made directly from pig lead and then precipitated by means of the use of a sulphate and under the proper conditions of temperature and PH value, and so on, obtaining a basic white lead sulphate precipitate.

Q. Which process is the cheaper manufacturing
3349 process, to make it directly from the ore concentrate or to make it by the precipitation method?

A. Made directly from the ore is the cheaper process.

Q. Does National Lead Company make basic lead sulphate?

A. To the best of my knowledge their production is very small.

Q. But they do make some?

A. I can't say positively. I believe that they do but I can't say positively beyond that. It would be very insignificant.

Mr. Wright: I object to that last answer, Your Honor. If he says he doesn't know I don't believe he should be permitted to answer as to the extent. I move it be stricken.

Trial Examiner Norwood: Read the last answer.

(The answer was read.)

Trial Examiner Norwood: The motion is allowed to strike the last part of the answer beginning with "It would be very—"

By Mr. Wood:

Q. Do you regard the National Lead Company as an important competitor in the manufacture and sale of basic white lead sulphate?

A. Very much so.

Q. In sulphate?

3350 A. Oh, not in sulphate. I was referring to white lead.

Q. Do you know of any competitor of Eagle-Picher in the manufacture and sale of basic white lead sulphate who manufactures directly from the ore concentrates?

A. I do not.

Q. What position in the industry does your company consider itself to have in regard to the cost of manufacturing white lead basic sulphate?

Mr. Wright: Your Honor, I object to that. It obviously must call for a conclusion on the part of the witness, who obviously cannot speak as to the costs of other manufacturers.

Mr. Wood: I asked his state of mind, the attitude of the company as to where they thought they stood on basic white lead sulphate.

Trial Examiner Norwood: Read the question.

(The question was read.)

Mr. Wright: If it is counsel's intention to bring out what this witness thinks the company's position is, I must object on the ground that what he thinks the company's position is is irrelevant and immaterial.

Mr. Wood: I only asked what he thought their position was, and I think that is quite important from the point of view of explaining the competition.

Mr. Wright: He has no facts to go on, that I can

3351 see.

Trial Examiner Norwood: He might explain his actions to meet what he understands the conditions are in the trade. I think he may show that.

I overrule the objection.

Mr. Wood: Will you read the question to the witness again, please?

Trial Examiner Norwood: You may want it understood as something which you have determined from your business experience; and as something which you have acted on.

(The question was read.)

The Witness: A favorable position.

Trial Examiner Norwood: That is in regard to costs? Does that question go to costs?

Mr. Wright: Costs of manufacture as between his company and other companies, Mr. Examiner.

Trial Examiner Norwood: Do you know of the costs of your competitors?

The Witness: No, I do not.

Mr. Wood: Can I ask him if he thinks they are higher or lower?

Mr. Wright: I submit that what he thinks his competitors' costs are is wholly incompetent.

Mr. DuBose: It goes to purpose, Your Honor, this whole Count 1 is permeated with purpose.

3352 Trial Examiner Norwood: Now, he establishes something here that bears on the question of competition, and I think that he must give us something more substantial than just his guess at that.

Mr. Wright: He has already testified that he doesn't know anything about what his competitors' costs might be, so how can he reach the conclusion that he did?

Trial Examiner Norwood: You can show us that in some reliable data. I will allow the motion to strike the last answer.

By Mr. Wood:

Q. Of the two white leads, does Eagle-Picher endeavor to sell one in preference to the other?

A. We have always pushed the sale of basic white lead sulphate.

Q. Why?

A. Because it fits into our picture better than the sale of basic white lead carbonate.

Q. In respect to which white lead do you consider your company to occupy the more favorable competitive position?

A. Basic white lead sulphate.

Q. Why?

A. Because we are in a very strong position, having our plant right in the midst of our ore bodies, and our central mill where the ore for the manufacture of basic white lead sulphate is closely available.

3353 Q. Now, if you attempted to make that basic white lead sulphate by the precipitation process, what would it be necessary to do, taking the product from the ore concentrate? What additional steps would be required?

A. It would be necessary to reduce the ore to metal lead, whereby litharge would be made, which would be the starting point for the manufacture by the wet process.

Q. Then what would be the next step in the wet process?

A. The lithage is placed in tank under agitation with the sulphate, and under proper conditions of precipitation, such as temperature, PH value, a basic precipitate is formed which must then be filtered, dried and pulverized.

Q. Now, how many steps are there in manufacturing from the ore concentrate?

A. Essentially one step.

Q. What is that?

A. Namely the mixing of fuel, ore and air in a concentric nozzle, from which the mixture enters into a combustion chamber with the immediate oxidization of the lead sulphate of the ore to basic white lead sulphate. The only other step is carrying the fumes, the product of the oxidation, from there through a settling chamber, then into classifiers and filling machines.

Q. Has there been any controversy in the industry in respect to the relative merits of the basic carbonate
3354 white lead and the basic sulphate white lead?

A. Yes, there has been considerable controversy over the value of the two white leads in ready-mixed paint a decade or so ago.

Q. For how long has that controversy continued?

A. Since the beginning of the use of the pigment.

Q. What is the position of the Eagle-Picher Company?

A. The Eagle-Picher Company's position is the use of basic white lead sulphate on an equal basis with basic white lead carbonate in basic white paints.

Q. Give us a typical formulation you would recommend which contains basic sulphate white lead.

A. The present-day formulation would contain approximately 30 percent of white lead.

Q. You mean sulphate white lead?

A. Either sulphate or carbonate. About 30 to 32 percent zinc oxide, 12 to 15 percent of titanium oxide, and the balance an inert or extender, usually in the form of magnesium silicate.

Q. Does your company manufacture zinc oxide?

A. Our company does manufacture zinc oxide.

Q. Does your company manufacture titanium dioxide?

A. It does not manufacture titanium dioxide.

Q. Does National Lead Company manufacture titanium dioxide?

A. The Titanium Pigment Company manufactures

3355 titanium oxide, which is reported to be a subsidiary of National Lead Company.

Q. And does National Lead Company manufacture zinc oxide?

A. It does not manufacture zinc oxide.

Q. Now, in what form does your company usually sell its basic sulphate white lead to the paint manufacturer?

A. In the form of leaded zinc oxide, which is a mixture of basic white lead sulphate and zinc oxide.

Q. How many different leaded zincs has your company sold to the paint industry?

A. Five or six.

Q. What have been the differences between them, in general?

A. The amount of basic white lead sulphate present.

Q. Is there ever any difference in the particle size or the pigment size?

A. There is always a difference in paint making properties, paint properties being influenced by the physical and chemical nature of the pigments.

Q. Now, if you had a customer that wished to buy your leaded zinc, what type would you sell that customer?

A. That would depend upon his needs. We would ordinarily sell him 35 percent.

Q. How would you determine your customer's needs?

A. By the nature of the formulation which he is making. That would include pigmentation and physical prop-

3356 erties of the paint which he desires.

Q. And on the basis of what information would you make your determination?

A. Your question is not clear.

Q. In picking out a particular leaded zinc to sell a particular customer, what information would you use as the basis for your selection?

A. We would have to know his pigmentation formulation. We would also have to know what particular properties he desires in his paint. Mixed paint is a compromise. We have to know on what properties he wishes to place the most emphasis. For example, brushability—a paint which will flow easily under the brush—is one example. Also the white lead content.

Q. Has your company had any experience with the properties of mixed paints?

A. We have had several years' experience in the properties of mixed paints.

Q. Well, have you tested out various mixed paint formulas on your test fence?

A. We are continually testing out and have for a number of years developments of our own and also commercially produced paints, and generally recommended formulations that we hear about in the trade.

Q. Well, is the information resulting from those
3357 various tests and experiments available to a customer or prospective customer?

A. That information in some cases, if it is a special matter where the customer wishes his problem kept confidential between himself and Eagle-Picher, the information is not disclosed; but in general the information which is built up on the basis of these tests is freely available to all of the industry.

Q. Can you state the relative production of the Eagle-Picher Company of the basic sulphate type of white lead and the basic carbonate type of white lead say in the 1941-42 period?

A. In the period 1941-42, the production of basic white lead sulphate per se—that is the single pigment not mixed with any other material—and the basic white lead carbonate were approximately equal; but the production of basic white lead sulphate in the form of leaded zinc oxide was considerably greater than that.

Q. Well, how much greater than the production of basic carbonate white lead?

A. Our production of leaded zinc oxide would be approximately three and one-half times the production of basic white lead sulphate.

Q. Now, is your leaded zinc oxide in competition with basic carbonate white lead?

A. In ready-mixed paint, it is in direct competi-
3358 tion as a source of white lead.

Q. I hand you a booklet marked Respondents' Exhibit 185 and ask you if you can state what that is?

A. This is a publication of the pigment division of Eagle-Picher Company which presents the properties and uses of super sublimed white lead, which is our trade name for supplying white lead for basic white lead sulphate.

Mr. Wood: I would like to offer in evidence Exhibits 184 and 185.

Mr. Wright: I haven't examined either of those exhibits and should like to have an opportunity to do so.

I should like a short voir dire on the identification of these documents.

Trial Examiner Norwood: All right, go ahead.

By Mr. Wright;

Q. When was Respondents' Exhibit 185 published, do you know, Mr. Goetz?

A. There may be a date on there. That was published in June, 1940.

Q. Who prepared it, do you know?

A. That was a matter of collaboration between the research laboratory, the staff, myself and our advertising department.

Q. There were several departments in Eagle-Picher who collaborated on them?

A. Three, I believe.

3359 Q. Was this prepared as an advertising bulletin?

A. You might call it that. It was prepared as an information circular to give the paint trade primarily the properties and uses of basic white lead sulphate as a paint.

Q. With the objective in mind of increasing the sales of your pigments?

A. Naturally, that is right.

Q. In the paint trade?

A. That is right.

Mr. Wright: Your Honor, I have no objection to the receipt in evidence of Respondent's Exhibits 184-A through D, but I do object to the offer of Exhibit 185. It is a long, technical advertising circular prepared by the Eagle-Picher Company. There has been no verification of the information which appears in it. I must object to its receipt in evidence as a statement of the facts which it contains because those facts are susceptible of being proved by direct evidence and competent testimony.

Trial Examiner Norwood: The witness said he prepared them.

Mr. Wright: No, I believe he said that was prepared through the research laboratory, through the advertising department and the technical services. I certainly want to preserve my objection to all that material that is contained in there.

3360 Trial Examiner Norwood: What do you think about that?

Mr. Wood: The witness has testified that they were

competing with National Lead. That was a document they got out in furtherance of competition.

Trial Examiner Norwood: This went to the customers?

The Witness: That is right.

Mr. Wright: It is an advertising circular to the customers. Now it is being offered presumably as a statement of facts about the relative technical differences in the manufacture of these pigments.

Trial Examiner Norwood: Well, I don't think it should be received for that purpose.

Mr. Wright: I would have no objection to its receipt in evidence as being what the Eagle-Picher Company believed in 1940 the case to be, but I certainly don't want it received as evidence of those facts.

Trial Examiner Norwood: It can be received as an actual act of competition; this is an instrument of that competition.

Mr. Wood: That is right.

Trial Examiner Norwood: The same as a representation made by a salesman as to whether or not there was any competition.

3361 Mr. Wright: There are statements here, for instance, purportedly taken from reports of State regulatory bodies, and so on.

Trial Examiner Norwood: The fact that he issued that to the trade can be shown. It will not be received to show the chemical content and the truth of those scientific statements. You will have to show that by other evidence.

Mr. Wood: By other witnesses, yes, I appreciate that.

Trial Examiner Norwood: It is limited to a showing that it is a sales instrument and it is received to be considered with respect to its bearing on competition, only. Received as marked, 184-A through 184-D, and 185.

(The documents referred to were marked RESPONDENT'S EXHIBITS NOS. 184-A, 184-B, 184-C, and 184-D and 185 and received in evidence.)

Mr. Wright: I would like to ask counsel if he has copies of those available?

Mr. Wood: I will try to get extra copies for you. Off the record.

(Discussion off the record.)

By Mr. Wood:

Q. Referring again to Exhibit 185, are you familiar with the contents of this exhibit?

3362 A. I am.

Q. Do you believe the contents of this exhibit to be true?

A. Absolutely true.

Q. In so far as comparisons of a pure basic carbonate white lead paint and a mixed paint containing basic sulphate white lead, have you ever on your own made any comparison between those two products?

A. Many times.

Q. Will you give us an example, some specific example that occurs to you where you yourself have made the comparison of the properties of those two types of paint?

A. The basic white lead carbonate type of paint is what we call a single pigment paint. There is very little can be done to regulate the properties of that paint. It is a paint which has been accepted by the trade for many years.

On the other hand, mixed paints are what we call multiple pigment paints in which we have two or more pigments, using today at least four. With this assortment of pigments much can be done to regulate the properties of that paint.

As, for example, a multiple pigment paint in white contains a certain type of titantium oxide, which is what we call a chalking type of pigment. The organic matter in the linseed oil, which is the vehicle, disintegrates and permits the pigments which do not react with the linseed
3363 oil to wash away or chalk away. That is an example of what can be done in the multiple pigment paints.

In general the multiple pigment paints present a more attractive appearance than do paints made from basic white lead carbonate.

Q. I asked you to give an example of a physical comparison that you yourself have made between the two types of paint.

A. You mean the actual details of inspection?

Q. Yes, some job that you yourself either made or inspected.

A. Very well. In Cincinnati, Ohio, about four years ago, in the same neighborhood, one house was painted with straight white lead in oil, as we call it, which would be a single pigment basic white lead carbonate paint; two houses down the street was a house painted within thitry days of the time the other house was painted, which had a well known brand of ready-mixed paint. At the end of about

nine months the house painted with white lead in oil or the single pigment basic white lead carbonate paint, showed a good film integrater but the painting was very unattractive in that it had an irregular dirt retention, whereas in the case of the multiple pigment paint the paint job was much more attractive because it was cleaner for the reasons which I mentioned just previously.

During the war I inspected hundreds of Army cantonments at three of which there were jobs on which
3364 straight white lead in oil had been used and also jobs on which two types of ready-mixed multiple pigment paint had been used. In all cases the multiple pigment paint showed greatly improved performance in the way of decoration over the straight white lead carbonate paint.

Q. I hand you a document marked for identification as Respondents' Exhibits 186-A through 186-E, inclusive, and ask you if you can state what that is?

A. These are photographs which were part of a brief which was presented to the members of the Federal Specification Committee on Paint at the request of the Chairman of the Committee. The manufacturers of basic white lead carbonate and manufacturers of basic white lead sulphate were required to present data concerning the usefulness and the properties of these two pigments in multiple pigment ready-mixed paint.

This exhibit which you gave me contains the photographs which were used in the exhibit presented by Eagle-Picher.

Q. What was the purpose of Eagle-Picher's exhibit?

A. The purpose of this Eagle-Picher Exhibit was to place into the hands of the committee information as to the performance of the two white leads, at the request of the chairman of the committee.

Q. Who was the chairman of the committee?

A. Mr. E. F. Hickson of the Paint and Varnish,
3365 Lacquer and Related Materials Section.

Q. Section of what?

A. Of the Bureau of Chemistry at the National Bureau of Standards in this city.

Q. Was he a Government employee?

A. He is a Government employee.

Q. What was he trying to do at the time?

A. A controversy arose in the committee which began

on the basis of representations made by manufacturers of these two white leads. The committee wished information as to how paints performed when made in one case with basic white lead sulphate and in the other case with basic white lead carbonate, all other conditions remaining the same.

Q. What was the purpose of the committee in desiring that information?

A. The purpose of the committee, which is a standing committee and part of the Bureau of Federal Supply, as it is now called—at that time it was part of Treasury Procurement—this committee is charged with writing specifications for paints and related materials for use by Government agencies.

Q. In this particular case what was the paint specification to be used for?

A. The paint specification was to be used for what we would call in the trade ready-mixed outside house paint.

In this particular case if you wish me to identiy the 3366 specification it was TT-P-40, paint, oil, exterior ready-mixed, light tints and white, and also Federal Specification TT-P-25a, paint, exterior primer, ready-mixed white (undercoat for wood).

Q. Now, why was the Government at that time particularly determining the specification?

A. Well, this committee—as all specification committees are charged with doing and really do do—is trying to keep their specifications up to date.

Now, in the old days the Federal specification TT-P-36 was used, which contained for whites 70 percent white lead, 20 percent zinc oxide, and 10 percent inerts. In the case of tints, 60 percent white lead, 30 percent zinc oxide, and 10 percent inerts.

Now, since that specification was written, which dates back to 1930, considerable progress has been made in the technology of paint. Our whole philosophy in the formulating of what we call house paint or exterior paint has changed, due largely to the introduction and finally wide acceptance of the pigment known as titanium, meaning either titanium oxide or a composite pigment containing 25 to 30 percent of titanium oxide.

Now, the committee, wishing to keep their paint specifications up to date—and that is one of the most pro-

gressive committees—looked into the matter of chang-
3367 ing their paint formulation. In looking into the matter, the chairman of the committee always casts about in industry for ideas and copies of the specifications in the proposed stage are quite widely distributed amongst interested people—the ASCM, for example; the Federation of Varnish and Production Clubs; paint manufacturers who so desire them, and raw material manufacturers who desire them may have copies of all proposed specifications. The knowledge that the specification was about to be changed became quite general, whereupon certain individuals proposed the mandatory use of basic white lead carbonate either entirely, or to an amount to be stated in the specification.

The situation became sort of confused with representations made by this person and that person both from raw material houses, mixed paint people, and members of the Government, that the chairman decided, with the advice and consent of this committee, to ask certain individuals to present data on the details of performance of paint made with either one of these two white leads, and this is a portion of the data which was prepared and presented to the committee, each and every member given the information as Eagle-Picher had developed it. The same information was presented by other manufacturers who specialized principally in basic white lead carbonate.

Q. By the same information, you mean similar information?

3368 A. Similar information, the same type.

Q. They were on the other side of the question, though, weren't they?

A. That is right.

Q. Now, who was on the other side of the question; that is, in favor of the carbonate as against the sulphate?

A. This goes back to 1941. The National Lead Company was one, and the Glidden Company was another. Those two companies were the principal factors in presenting the data concerning basic white lead carbonate, whereas Eagle-Picher was the only one presenting data stressing basic white lead sulphate. Keep in mind that this data states the properties of each pigment, not one but each pigment, as was the case with the two companies just mentioned.

Q. In other words, they were contending for the su-

periority of the basic carbonate white lead without showing the properties of the basic sulphate white lead?

A. No, they contended that basic white lead carbonate had performed better in multiple pigment paints than basic white lead sulphate, by means of data which they had established and presented to the committee. Eagle-Picher, on the other hand, merely endeavored to and did show the equality of the two white leads as the source of white lead in multiple pigment ready-mixed paints.

Q. Before introducing this into evidence, I would like you just to summarize what these photographs show.

3369 Mr. Wright: Your Honor, I object to any summarization of what the photographs show. That is not a proper identification of the document.

Trial Examiner Norwood: Do not summarize any of the information in that paper, but you may summarize your description, telling us what it is. I do think you have completed that already.

Mr. Wood: Well, I will withdraw the question.

Trial Examiner Norwood: In other words, these are documents that were submitted to that committee on those questions.

Mr. Wood: I will withdraw the question, and offer into evidence Respondents' Exhibit 186-A through D.

Mr. Wright: Your Honor, I have several objections to this data. In the first place, it is obviously incomplete, and it is meaningless in and of itself. It is copies, apparently, of Sheets 1, 2, 4 and 7 of an appendix to a brief. There is no showing on this document of how these tests were conducted, if they are the result of tests, or what procedure was followed, or what the significance of them is. They are not competent evidence, in addition to the fact that they are entirely irrelevant.

Mr. Wood: I don't see how they can be considered irrelevant. The witness has testified that is part of the data submitted to the Government.

3370 Trial Examiner Norwood: I think it is time for the lunch hour. I will take this and look it over, and give my ruling after lunch.

What is counsel's pleasure?

Mr. DuBose: 2 o'clock.

Trial Examiner Norwood: We will recess until 2 o'clock.

(Thereupon, at 12:20 o'clock p.m., a recess was taken until 2 o'clock p.m.)

3371 Afternoon Session

(The hearing was resumed at 2 o'clock p.m., at the expiration of the recess.)

Trial Examiner Norwood: The hearing will be in order.

With regard to the offer of Respondents' Exhibit 186-A through D for identification, I see no reason why you cannot put in these photographs here showing the difference under similar circumstances of the results obtained from the sulphate and the carbonate; but in its present condition, its only basis is that it is an exhibit to a brief which was submitted to the Committee of the Bureau of Standards. I presume that brief was to maintain one side or the other of some contention; I don't know. But that wouldn't give it a proper basis in evidence, as was the case of this other document that we took in. That was sent out by these people, but this doesn't have a competitive angle at all. This is purely a matter of fact as to the effects of these two different commodities or two different ingredients.

Mr. Wood: I might ask the witness the purpose of the brief.

Trial Examiner Norwood: If you will indicate this, or if he will testify that this is a fact, or will testify to the circumstances, and those differences are found to be relevant, you may do that.

3372 Mr. Wright: I don't see the relevancy of this at all. I don't see what counsel has in mind proving here. There is no contention that the products that Eagle-Picher manufactures and sells are not of equal quality with any other.

Trial Examiner Norwood: He is showing some things he is doing here to meet competition. These are competitive methods here, some activity here in investigating these differences and in developing this particular paint to meet competition. He is offering it for that purpose.

Mr. Wright: I concede that the Eagle-Picher Company has done technical research in paints and in various pigments, but of what possible relevance are comparative tests which are not described? This is just the end result apparently of some comparative tests which are not described in the exhibit, as to the value of a paint made with one type of pigment that Eagle-Picher sells as against a paint with another type of pigment that Eagle-Picher sells.

This isn't comparative as between Eagle-Picher and other companies.

Mr. Wood: On the contrary, the witness has testified that Eagle-Picher was pushing sulphate white lead, and National was pushing carbonate white lead. It is competition between these respective companies.

Mr. Wright: I disagree there is any evidence of competition between National and Eagle-Picher Company,
3373 your Honor.

Trial Examiner Norwood: Isn't that as far as you need to go to show that there is competition?

Mr. Wright: If counsel means by competition that his company sells one type of product and that National Lead solicits customers in the same type of business for that and similar types of products, there is no issue there between us.

Trial Examiner Norwood: He corroborates his statement that there is a difference between these by putting in these photographs here to show there is a difference in the results they obtain between the two.

Mr. Wright: I submit that hasn't been proven. It isn't proved by those exhibits.

Trial Examiner Norwood: He may do that, if he can authenticate it.

Mr. Wright: But National sells both of these materials, and Eagle-Picher sells both of these materials, as far as the record shows now.

Mr. Welch: But the percentage of each different product sold by the two companies varies considerably.

Mr. DuBose: Not only that.

Mr. Wright: I think that is a subject of proof.

Mr. Welch: There is no testimony to that effect.

Mr. DuBose: We maintain that price competition
3374 does not mean price war.

Trial Examiner Norwood: Go ahead, Mr. Wood.

ALVIN C. GOETZ resumed the witness stand and was examined and testified further as follows:

Direct Examination (Resumed) by Mr. Wood.

Q. Now, Mr. Goetz, in the period 1941 to 1942 was there any difference in the cost of paint manufactured from the two different varieties of white lead, carbonate and sulphate?

A. Yes, there was a difference in favor of the use of basic white lead sulphate, either as such or in the form of leaded zinc oxide.

Q. How much cheaper would a gallon of paint using the sulphate type of white lead be than a gallon of paint using the carbonate of substantially equal quality?

A. Between six and seven cents a gallon in favor of the basic white lead sulphate type of formulation.

Trial Examiner Norwood: Is that a substantial difference?

The Witness: That is considered in the paint trade a substantial difference. I might say that that depends on your formulation. We used in 1942 the 60-30-10 or the 70-20-10 type of formulation, which was then quite commonly used. In some areas, Your Honor, that is the
3375 difference between a profit and a loss.

Mr. Wood: Will you mark this Exhibit 187-A and B, please?

(The document referred to was marked Respondents' Exhibits 187-A and 187-B for Identification.)

By Mr. Wood:

Q. I show you a document marked 187-A and B, and ask you whether or not you know what this is?

A. Yes, this is a letter sent to the members of the Federal Specification Paint Committee with reference to the use of the two white leads in Federal Specification TT-P-36a, 101a and TT-P-81.

Q. Now, at that time what was the status of the two white leads as far as Government specifications were concerned?

A. The specifications permitted the use of either white lead to satisfy the white lead content required by the specification.

Q. Now, I call your attention to the statement appearing in the last paragraph on the first page of this letter, which reads:

"Because basic sulphate white lead as such (or in the form of leaded zinc oxide) is cheaper per pound than basic carbonate of lead, I am informed that no basic carbonate white lead was used in the million gallons of paint. As a result, I have received a request from a large basic
3376 carbonate white lead producer that this committee specify that one-half of the white lead in pigments

of the TT-P-36a, TT-P-101a and TT-P-81 be basic carbonate of lead."

Mr. Wright: I object, Your Honor, and ask that counsel's question be stricken.

Mr. Wood: I haven't asked it yet.

Mr. Wright: I ask that counsel's statement be stricken, because that document is not in evidence.

Mr. Wood: I will offer the document in evidence.

Trial Examiner Norwood: Have you finished your question?

Mr. Wood: No, I haven't finished the question.

By Mr. Wood:

Q. Do you know who the basic carbonate white lead producer was that wanted the specifications changed?

Mr. Wood: I will introduce this into evidence.

Trial Examiner Norwood: I am confused over this situation here. This has been read into the record, but you didn't ask him if that were true. You read that to refresh his memory with respect to a certain firm there?

Mr. Wood: I identified the exhibit. I could put it in at that time after identification, but I was going to show its pertinence first by reading a section to him and asking him what he knew about that section. It is optional 3377 with me as to when I offer it in evidence.

Trial Examiner Norwood: Is there a motion?

Mr. Wright: I made a motion to strike counsel's question with his statement of what was in that document, out of the record.

Trial Examiner Norwood: I will allow that motion.

Mr. Wood: In that case I will offer the document into evidence first as Exhibit 187-A and 187-B.

Mr. Welch: Off the record, Mr. Examiner.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Mr. Wright: I am going to object to this, Your Honor, because it is absolutely irrelevant. It has no evidentiary value in this proceeding. It is obviously a letter seeking information on the subject of the comparative qualities of these pigments by the Chairman of the Technical Committee on Paint. It is evidence of nothing except that the committee did seek information on the pigments and it has no relevancy at all to this proceeding.

Trial Examiner Norwood: Do you concede that they did so seek?

Mr. Wright: The letter purports to show that. The witness has testified under oath that he received that from that man. I have no way of going back of that.

Trial Examiner Norwood: Off the record just a
3378 minute.

(Discussion off the record.)

Mr. Wood: I think it is extremely relevant on this count: That the charge here in this case is that the National Lead Company has monopolized the white lead business, controls it; that there is no competition in it and that Eagle-Picher has collaborated and cooperated with National to maintain that situation. That document and the other companion documents that go with it will show that the carbonate manufacturers tried to get a Government specification changed so that there had to be a high percentage of carbonate, the more expensive carbonate present in the formulations to come under the Government specifications, and that Eagle-Picher fought that tooth and nail in an effort to sell the greatest amount of sulphate possible, which was the cheaper of the two products. If that doesn't show competition I don't know what does.

Mr. Wright: Your Honor, right on that point maybe I can help Mr. Wood out. I appreciate there have been probably many instances in the recent history of this industry where there have been controversies about one thing or another in the lead business between Eagle-Picher and National and between Eagle-Picher and other members of the industry. The charge in this complaint relates to price competition. Now, I believe Mr. Wood has practically conceded that there is no such thing as price
3379 competition. I am willing to concede that there is what Mr. Wood considers to be competition in the furnishing of technical services and sales services and the like.

Mr. Wood: I think this is an excellent example of price competition because the witness has just testified that the use of the Eagle-Picher material provided a more economical paint. If that isn't price competition what is price competition?

Mr. DuBose: In addition to that we do not concede Mr. Wright's remark that we admit there is no price competition in this industry. We distinctly claim that there is.

Mr. Welch: Your Honor, if I may make an observation, price competition even according to the Commission's theory ultimately turns not on the price to the customer—and using the Commission's definition of price—turns not on the price to the customer but the ultimate return to the manufacturer. The witness on the stand has already testified that the costs of two different products are entirely different so there is no price competition under the Commission's definition.

Trial Examiner Norwood: You mean there is competition in mill net?

Mr. Welch: Yes, sir.

3380 Mr. DuBose: Under the Commission's theory.

Trial Examiner Norwood: I will ask counsel to explain to me tersely the purpose of respondents' Exhibit 187-A to 187-B. Is it to show the truth of the contents there or to show the fact that this circular was sent out to the trade or to the paint industry?

Mr. Wood: That was sent to us.

Trial Examiner Norwood: It can't be admitted to show the truth of any of the facts therein stated.

Mr. Wood: I don't care about the truth of the facts therein stated, particularly.

Mr. Wright: For what other purpose could it be offered except to show it was an inquiry for information?

Trial Examiner Norwood: To show there was a contest between these people and that that contest was taken up before the Bureau of Standards and before this committee.

Mr. Wright: I don't believe that letter shows there was a contest between any particular people.

Mr. Wood: It is the opening document in showing the contest.

Mr. Wright: I assume from counsel's question, to which you sustained an objection, he is going to attempt by this witness, on the basis of that document, to identify unnamed parties who are mentioned in that letter.

Trial Examiner Norwood: Can't this witness tell

3381 us of his own knowledge everything he knows about this subject here?

Mr. Wood: You mean without the documents?

Trial Examiner Norwood: Yes. He can use them to refresh his memory then if Commission's counsel wants to let them in evidence, he can do it. I will sustain the objec-

tion to it for the time being, to that exhibit, that is 186-A to 186-E and counsel can proceed to bring out that information in a little more satisfactory way.

By Mr. Wood:

Q. Do you remember any sort of an controversy in the spring and summer of 1941 in respect to the basic carbonate and basic sulphate white lead in ready-mixed paints, TT-P-36a, TT-P-101a and TT-P-81?

A. I do remember a controversy.

Q. Will you state what you remember of that controversy?

A. The controversy arose at the time the specifications were reopened to bring them up to date in current paint technology, at which time a certain group of manufacturers of white lead whose product was either entirely the carbonate type or predominately the carbonate type, sought to have written into the specifications that a certain amount —they first desired 100 percent and later reduced their demand to 50 percent—of the white lead used to satisfy the white lead requirements in the specification should be
3382 the basic white lead carbonate type of white lead.

To support that position certain pamphlets were issued as requested in Mr. Hickson's letter which has just been under discussion.

Q. What position did the Eagle-Picher Company take in respect to that proposed change?

A. Eagle-Picher pointed out that for a number of years, 20 or more years, the two white leads had been accepted on an either-or basis and that it was not fair to the public or to the Government to require basic white lead carbonate at a higher price. We were agreeable that the matter should be entirely optional. We did not insist it should be one way or the other, we wished it to be optional on the part of the paint manufacturer.

Q. Who were the companies that were trying to put over the carbonate?

A. The National Lead Company, the Glidden Company and the Euston Company, which is part of the Glidden Company and also the Anaconda White Lead Company, or more properly, perhaps, known as the International Smelting & Refining Company.

Q. What were the relative prices of the basic lead carbonate white lead and the basic lead sulphate white lead?

A. There was a half a cent a pound difference. The exact price I cannot give from memory except to say they were on the order of six or eight cents a gallon.

3383 Q. Was there any additional saving by the use of leaded zinc?

A. A slight saving by the higher bulking value of basic white lead sulphate; largely theoretical, but some saving in that respect.

Q. That is over the sulphate alone?

A. No, over the carbonate. When used in the form of leaded zinc oxide there was an additional saving at that time and with the paint being made at the time it would amount to a difference in the order of six to seven cents a gallon.

Q. Why did Eagle-Picher when it was making both the carbonate and the sulphate types of white lead put up a struggle to prevent the change in making the certain percent of carbonate mandatory?

Mr. Wright: Objection, Your Honor, there has been no testimony that there was a struggle put up.

Mr. Wood: I think he testified that they resisted.

Trial Examiner Norwood: I think so. Did you, or not?

The Witness: I think that I did. I started to say that the Eagle-Picher Company resisted this change and I think there was an objection. I don't know whether I finished that statement, or not.

By Mr. Wood:

Q. Go ahead, anyhow.

3384 Trial Examiner Norwood: Answer the question. Objection overruled.

The Witness: What is the question?

Mr. Wood: Read it, please.

(The question was read.)

The Witness: Because Eagle-Picher's greatest interests lay in the use of basic white lead sulphate, because we were predominately a basic white lead sulphate house, whereas all of our competitors were either 100 percent or predominately basic white lead carbonate houses. Furthermore, since the specification had been entirely satisfactory to the Government and also in industry where the two white leads were used interchangeably, we could see no reason for making the change.

By Mr. Wood:

Q. How general was the competition between the basic white lead sulphate or the leaded zinc containing the basic white lead sulphate, and the basic carbonate white lead?

A. In the past decade the competition was extremely keen both as between basic white lead sulphate and carbonate as such, and also between basic white lead carbonate and basic white lead sulphate in the form of leaded zinc oxide.

Q. And has that competition been price competition?

A. That has been price competition due to the difference in the cost of arriving at a mixture of leaded zinc
3385 on the basis of leaded zinc oxide, or a mixture of basic white lead sulphate and zinc oxide.

Q. Now, did the controversy regarding those Government specifications continue into the year 1942?

A. Sometime in late '42, or early 1943.

Q. Do you know what the outcome was?

A. Yes, the outcome in the case of the Federal specification which finally issued under the No. TT-P-25—that is the primer specification—was that the white lead was mandated to be 50 percent white lead carbonate and 50 percent white lead sulphate.

Q. Was that with Eagle-Picher's agreement?

A. That was with Eagle-Picher's agreement, but there was also another specification involved, TT-P-40, in which the white lead content was allowed to be optional, and there were special reasons why there was a difference in the action of the committee in those two specifications.

Q. You used the word "agreement." You said with Eagle-Picher's agreement. Eagle-Picher's agreement with whom?

A. Perhaps I misused that word agreement. By agreement I meant during the prolonged discussions of this specification, in order to bring about some satisfactory specifications, with reference now to TT-P-25, the primer, Eagle-Picher decided, "Well, we are just not going to ball up the works any more. Let the boys go ahead and
3386 get out the specification. The Army is in need of primer paint. Let us go along and settle it."

So it finally came out on the so-called compromise basis, 50 percent of each, to satisfy the white lead content in TT-P-25.

Q. Do you remember whether or not your company protested to Mr. Hickson over the adoption of that 50 percent mandation of basic carbonate white lead?

A. I do recall such a protest.

Q. Do you remember the contents of that protest?

A. Well, substantially the protest was made on the basis that the optional use of the white leads had been satisfactory over a long period of years, in the case of one type of paint, namely TT-P-40, and we could see no reason to make a change at this time. In the case of the other type of paint, the primer TT-P-25, there was a divided opinion as to whether 100 percent of white lead of one type or the other type, or a 50-50 mixture of the two should be used in that type of formulation.

Q. Does the Eagle-Picher Company manufacture a product called blue basic lead sulphate?

A. It does.

Q. For how long has it manufactured it, to your knowledge?

A. To my personal knowledge, it has been made for 25 years or longer.

3387 Q. Does your company manufacture a product called red lead?

A. It does.

Q. What is the relationship between blue lead and red lead as far as their use is concerned?

A. Both are used substantially for protection of iron and steel against rusting.

Q. How is red lead manufactured by the Eagle-Picher Company?

A. Red lead is manufactured from litharge, which is first manufactured from pig lead.

Q. And how is blue lead manufactured by the Eagle-Picher Company?

A. Blue lead is manufactured from ores direct without first reducing the ores to pig lead.

Q. Which is the cheaper as manufactured by the Eagle-Picher Company? Which is the cheaper of the two products as manufactured by the Eagle-Picher Company?

A. The blue lead is the cheaper.

Mr. Wood: Will you mark that 188, please, and this 189.

(The documents referred to were marked Respondents' Exhibits 188 and 189 for Identification.)

By Mr. Wood:

Q. I hand you two exhibits, marked 188 and 189 respectively, the first bound in blue and the second in red, and ask you what those two documents are?

3388 A. This (indicating) Exhibit 188, is a brochure put out by the Eagle-Picher Company describing the properties of blue lead, basic white lead sulphate, and giving formulations for their use in primers for the protection of ferrous surfaces under several types of exposure.

189 is a similar publication put out by the National Lead Company dealing with formulations for paint based on red lead.

Mr. Wood: I offer these two documents into evidence, Your Honor.

Mr. Welch: May we have a five-minute recess while the gentlemen are examining the documents?

Trial Examiner Norwood: It is a little early for the recess.

Mr. Wright: I might say, Your Honor, that there appear to be about 40 pages of printed material in these documents which I have never seen before.

Trial Examiner Norwood: We will take a five-minute recess.

(Thereupon a short recess was taken.)

Mr. Wright: I would like to ask a few questions on voir dire.

By Mr. Wright:

Q. Mr. Goetz, this document, respondent's Exhibit 188 for identification, what use it made of that? Has that

3389 been published to the trade generally?

A. This particular document has had limited circulation. It is circulated to paint manufacturers. It is designed particularly for formulators who have more than an average interest in the formulation of paints for protecting iron and steel under specific conditions.

Q. In other words, it is technical information by way of advertising your products to your customers?

A. Of course. We do this in the hope we are going to get some return in the way of tonnage, that is right.

Q. I notice there are some pencilled notations through here. What is the source of those notations?

A. Probably something I put down there for future changes.

Mr. Wood: May we go off the record?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

The Witness: It is very difficult, no matter how hard you try, to keep everyone in the company interested and after it goes to press and is actually being printed, in the last stages, you will always find something that needs changing so as soon as it comes out I always make it a point to go over it and make changes for future revisions.

By Mr. Wright:

Q. How did you come into possession of this document, Exhibit 189?

3390 A. That is generally available in the industry.

Trial Examiner Norwood: Is that a document from Eagle-Picher?

Mr. Wright: No, sir, this is a document that has printed on it "Published by the National Lead Company." I object to the receipt of these documents in evidence. They contain a mass of technical data on the composition of various types of paint. I think a glance at random will disclose the nature of the documents. I fail to see that they have any relevancy to the proceeding at all.

Mr. Wood: It is our position, of course, Your Honor, that they are excellent evidence of competition between the two companies.

Trial Examiner Norwood: Well, you don't object to the identification of this as being something that National issued, do you?

Mr. DuBose: Your Honor, I haven't made any objection yet. I should like to reserve my objections on the ground that perhaps it may be incorrect or it may not be a proper document published by the National Lead Company. I have no doubt that it is but I should like to reserve my objections on the ground of correction.

Mr. Wright: There are many, many statements of fact and expositions of fact reported in these two documents.

Certainly I don't think it is competent to prove those

3391 statements of fact by this method or by these documents.

Mr. Wood: I will make the statement that the documents are not offered to prove the accuracy of the facts represented in either document, but merely to show the technical warfare that is going on between the two companies.

Mr. Wright: I object to them as being incompetent to show any technical warfare between the two companies. They don't show any technical warfare on their face. They show that one company in one document is advocating a certain specification of paints for certain purposes, and another company is advocating another specification for paint for certain purposes. It is not shown that those purposes are the same.

Mr. DuBose: I take it that is the purpose of the offer.

Trial Examiner Norwood: So I understood.

Mr. DuBose: Solely.

Mr. Wood: Yes.

Trial Examiner Norwood: I think they may be admitted for that purpose. I will overrule the objection and receive Respondents' Exhibits 188 and 189, they being permanently bound pamphlets.

(The documents previously marked RESPONDENTS' EXHIBITS 188 and 189 for Identification were re-
3392 ceived in evidence.)

By Mr. Wood:

Q. Does the National Lead Company put out blue basic lead sulphate?

A. They do.

Q. National Lead?

A. They sell blue lead also, but not in any quantities.

Q. How long have they sold it, if you know?

A. A matter of 20 years to my knowledge; it has been listed on their price cards although I don't think they sell much of it.

Trial Examiner Norwood: It is understood that Respondents' Exhibits 188 and 189 are received for the purposes for which they were offered, as stated by counsel.

Mr. Wood: That is right.

Mr. Wright: As I understand it Mr. DuBose was reserving objection, was he not, to the receipt of Exhibit 189?

Mr. DuBose: Reserving objection, Your Honor, not making objection, subject to the accuracy thereof.

Trial Examiner Norwood: He can move to strike them later if he wants to.

Mr. Wood: As far as I am concerned if Mr. DuBose can show that that document is a forgery I will be glad to withdraw it.

3393 By Mr. Wood:

Q. Now I hand you a document, four pages of which have been marked 190-A to D, inclusive, and will ask you if you can state what this booklet is?

A. This is a booklet put out by the National Lead Company on the subject of structural metal painting.

Q. I call your attention to the heading and the matter thereunder beginning at the bottom of page 52, which is marked here Exhibit 190-A, and ask you what the substance of that material is?

Mr. DuBose: I object, Your Honor, on the ground that this is referring to a document not in evidence.

Trial Examiner Norwood: Yes, objection sustained.

Mr. Wood: Your Honor, I am in a very difficult position here on this account: It is one case where I am offering a document for the untruth of what is stated, instead of the truth of what is stated. In other words—

Mr. DuBose: I object to that remark, Your Honor. As I understand counsel it is a document prepared by the National Lead Company and I move to strike the remarks of counsel.

Trial Examiner Norwood: Motion denied, it having appeared that it was a National Lead document. Counsel volunteered that.

Mr. Wood: It has been identified as such.

3394 Trial Examiner Norwood: But it hasn't come in yet. You can move to strike it after it comes in.

Mr. Wood: May we go off the record, Your Honor?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

By Mr. Wood:

Q. I call your attention to the cover page of this document, Respondents' Exhibit 190-D, and ask you to state your understanding of the origin of the document.

Mr. DuBose: Your Honor, I think we can perhaps simplify this matter by saying that I reserve my objection. For the moment I concede that to all apparent purposes it was issued by National Lead Company. I reserve, however, on the record my objection to the document, should it appear at any time later that it is not a document issued by the National Lead Company.

Mr. Wright: I should like to have the document properly identified on the record, in any event.

Trial Examiner Norwood: Now, is there a question pending?

Mr. Wood: Yes, sir. Will the reporter read it, please?

(The question was read.)

The Witness: The origin is the National Lead Company.

3395 By Mr. Wood:

Q. How did this document come into your possession, if you remember?

A. I picked it up in the trade some place. It was widely distributed.

Mr. DuBose: May I have the right of preliminary cross-examination here?

Trial Examiner Norwood: Just wait until he gets through identifying it.

Mr. DuBose: I beg your pardon.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

By Mr. DuBose:

Q. Mr. Goetz, do you recall under what circumstances the Eagle-Picher Company got this document, a few pages of which have been marked as Respondents' Exhibit 190-A to D, inclusive, for identification?

A. Yes. We heard about the circulation of it in the trade and we were able to pick one up.

Q. When you say in the trade, what do you mean?

A. Amongst paint manufacturers and paint specification writers.

Q. When you say "We picked it up in the trade," what do you mean, a salesman of yours?

A. Someone at Eagle-Picher picked that up.

3396 Q. And brought it back to your office?

A. That is correct.

Q. Outside of that you have no independent knowledge of who published this document, is that correct?

A. That is correct.

Mr. Wood: I offer the document into evidence.

Mr. DuBose: Just the pages that are marked?

Mr. Wood: Just the pages that are marked.

Mr. DuBose: Your Honor, may I state for the record that we, subject to correction, concede that this is a publication issued by National Lead Company.

Mr. Wright: Your Honor, I am not going to object to this on the ground of the identification subject always, of course, to a motion to strike later when I have had an opportunity to examine it, but I am going to object to its offer in evidence as being absolutely immaterial and irrelevant.

It is shown on the record that both of these companies produced both red lead and blue lead and what one of them might think about certain tests it has made as against what another might think about certain tests it has made, has absolutely no relevance to this question about price fixing.

We simply contend that the price of red lead has been fixed by these two companies and others acting in
3397 concert and we contend that the prices of these other pigments, lead sulphate and lead carbonate and blue lead have been fixed by a meeting of the minds of the companies. Whether one of them advocated the use of one over another is an entirely irrelevant proposition.

Trial Examiner Norwood: It is like some of the other evidence we have received here—and some of it on behalf of the Commission's contention—standing alone it would probably not mean much but taken in connection with other circumstances it might. I can't prejudge this thing. I can't say now but for the p pose of showing that one of these respondents was making statements in disparagement of the other's product, that is something they can properly show here as one of the circumstances bearing on what he has stated he proposes to show. I think since the document has been satisfactorily identified that it might be received to show that one thing.

Mr. DuBose: If I might say so, it seems to me it would fly in the face of common sense to say that there was a conspiracy and then to have one conspirator disparage a product of his co-conspirator.

Trial Examiner Norwood: That is a matter for counsel to discuss later on in his arguments and the fact that he might base an argument on that is one reason why I am receiving it.

3398 I will overrule the objection and receive these four pages in evidence for that purpose, and that purpose only, to show that National was disparaging the product of Eagle-Picher, or intending to show that.

Mr. Wright: Your Honor, I submit that is not a proper

characterization of that exhibit, that National was disparaging the products of Eagle-Picher.

Trial Examiner Norwood: I didn't say that, I said I admit it for the purpose of showing that; I don't say whether it shows it or doesn't show it, but counsel has offered it for that purpose and all I have to determine is that there is some small degree of relevancy or some degree of relevancy, however small, which would justify me in admitting it which would not justify me in excluding it.

This document is received Respondents' Exhibit 190A through 190-D. 190A is page 52; 190-B is page 53; 190-C is page 54 and the title page is marked Respondents' Exhibit 190-D. They are received in evidence for the special purpose stated.

(The documents referred to were marked RESPONDENTS' EXHIBITS 190-A, 190-B, 190-C and 190-D and received in evidence.)

Mr. Wood: I wish it clearly understood on the record that I am not offering the document as proof of the contents therein, but only for the purpose as stated by
3399 the Examiner.

Trial Examiner Norwood: Are you going to put photostats of that in, or not?

Mr. Wood: Yes, I will ask the reporter to obtain photostats of those pages.

Trial Examiner Norwood: And substitute them before you send them to the docket section?

Mr. Wood: Yes, sir, and substitute them.

Trial Examiner Norwood: Proceed.

By Mr. Wood:

Q. Now, what are the relative selling prices of red lead and blue lead?

A. Red lead sells at an appreciably higher price than blue lead.

Q. Can you state approximately how much higher?

A. I will have to speak from memory now, but in the order of two or more cents per pound.

Q. How, between the two products, which one does your company push?

A. We push the blue lead.

Q. Why?

A. For the reason that we are in a favorable position for the manufacture of that product, and in addition it has

certain properties in paints not possessed by other pigments.

Q. Now, over a period of years, has your research
3400 laboratory expended any time or effort in improving the quality of blue lead in relation to the properties of red lead?

A. Well, our laboratory has investigated and approved the properties of both pigments, and emphasized the properties of blue lead to a very considerable extent and at considerable cost.

Mr. Wood: You may cross-examine.

Mr. DuBose: May I request the privilege of cross-examination before counsel for the Commission, if it is all right counsel for the Commission?

Mr. Wright: I have no objection to that.

Trial Examiner Norwood: Counsel may examine the witness: I am not sure you could properly call that cross-examination.

Mr. DuBose: As the answers may appear, I don't think it is either cross-examination or any other. It is examination by a correspondent in the case.

Trial Examiner Norwood: Go ahead.

By Mr. DuBose:

Q. Mr. Goetz, I believe you testified that in the Eagle-Picher Company you pushed, so-called, blue lead and also sulphate of lead, whether individually or as a component part of leaded zinc oxide. Is that correct?

A. I did.

Q. Now, in the industry, so far as sulphate of lead
3401 and carbonate of lead are concerned, was there a difference of opinion as to the efficacy of one over the other?

A. There was at one time.

Q. Particularly during the period, we will say, between 1923 up through 1934, was there a difference of opinion?

A. I would say there was a difference of opinion in that period.

Q. When did that opinion change, in your opinion?

A. The last words, please?

Q. When did that opinion as to the difference between sulphate and carbonate of lead change, in your opinion?

A. Within the last ten to fifteen years.

Mr. DuBose: I have no further questions.

Trial Examiner Norwood: Cross-examine.

Cross-Examination by Mr. Wright.

Q. Mr. Goetz, all your testimony has been with reference to the different pigments sold to paint manufacturers, has it not? That is all your department covers, is it not?

A. That is right.

Q. You have nothing to do with the white lead and oil?

A. To some extent I do.

Q. You haven't anything to do with the red lead, the litharge and battery end of the business?

A. No, I do not.

3402 Q. What was your tonnage of blue lead in 1941 sold to paint manufacturers for use as a pigment?

A. That figure I do not have in mind.

Q. Can't you give us an approximation of it?

A. In the order—I am guessing now, because I cannot carry figures that far back—of ten to twelve hundred tons.

Q. What was your tonnage of red lead in that same period?

A. There again I am guessing, but in the order of 10,000 tons, maybe a little less or it might be a little bit more, for paint purposes.

Q. In other words, it would be about equally divided?

A. No, just a minute. That is an industry figure. I really don't know.

Q. You don't know then whether you sell more red lead than blue lead, or vice versa?

A. I would say we sell much more red lead than we do blue lead.

Q. For paint purposes?

A. For paint purposes, but I am sorry I cannot give you the figure. I can give you the industry figure, which I would estimate is in the order I stated, namely, eight or ten thousand tons of red lead used for the manufacture of paint. Eagle-Picher's share I do not know.

Q. How is blue lead sold by Eagle-Picher Company? Can you tell me that?

3403 A. Yes, blue lead is sold in dry form in barrels and bags of 50 pounds net weight each. It is also sold mixed or ground into paste with linseed oil.

Q. What sort of containers is it sold in when ground in a paste?

A. In the customarily used metal kegs, steel metal kegs.

Q. One hundred pounds, 50 pounds and 25 pounds?

A. One hundred, 50, 25 and 12.5.

Q. What zone differentials are quoted on blue lead?

A. Sir, I cannot answer your question on that. I don't know.

Q. You don't know what the pricing setup is?

A. I don't know. I can only make the assumption that it is sold on the same basis as red lead and white lead.

Q. It is sold on the same basis?

A. I would assume that, but I cannot say positively, because I do not know.

Q. You stated it was sold at approximately two cents a pound cheaper than red lead?

A. I was speaking of the dry pigment.

Q. The dry pigment?

A. And that was an estimate, if you will recall, too. I would have to look in the records for that.

Q. How many people work in your technical service department for the pigments division, Mr. Goetz?

3404 A. Principally myself.

Q. Do you have any assistants?

A. I have the assistance of several of our salesmen part-time when I need it, and I have the wide assistance of our research laboratory.

Q. What is your relation with the research laboratory?

A. My relation is to keep the research laboratory informed of new developments, and to plan and work with them on programs of investigation, principally on paint matters.

Q. Now, does the research department cover all the scientific investigations for all the various divisions of the company?

A. Our research department carries on investigations for all of the divisions of the company, but it does not necessarily do all the investigational work, because some of it may be done outside from time to time.

Q. Well, they would handle all the paint matters and all the storage battery matters?

A. Substantially so, yes.

Q. And all the metallic lead research?

A. Substantially so. The company may see fit to have a problem worked out outside of the company, which is customary these days.

Q. Can you tell me what the approximate budget was for technical research on the pigments division matters in 1941?

3405 A. I am sorry, I do not have that figure.

Mr. Wood: I may say that all of this information Mr. Wright is asking and not getting the answer from this witness will be supplied, if he so requests, through other witnesses.

Trial Examiner Norwood: All right.

By Mr. Wright:

Q. Your work in the technical research department of the pigments division covers work on zinc oxide as such, doesn't it?

A. Yes, it does.

Q. And on leaded zinc oxide, a combination of the two?

A. That is right.

Q. Does Eagle-Picher Company produce any other pigments than those which have been mentioned here this morning?

A. We produce basic white lead silicate, which I don't think was mentioned this morning. It was mentioned this afternoon, but only in reference to the bulletin which was offered as an exhibit.

Q. And blue lead, red lead, litharge, basic carbonate and basic sulphate. You don't produce any lithopone?

A. Yes, we produce lithopone.

Q. Are you a large producer of lithopone?

A. I would say we are a relatively small producer of lithopone.

3406 Q. At what plant do you produce lithopone?

A. At our plant in Argo, near Chicago, Illinois.

Q. Lithopone pigment is interchangeable with the leaded zinc oxide?

A. No, it is not, not in the opinion of a big majority of paint technologists. It is used for a different purpose.

Q. Has it been used in place of the other white lead and zinc pigments?

A. It has in an emergency, but only because some other pigment is not available. I wish to point out it was only in an emergency, and such use is not countenanced by good formulators. One is an interior pigment and the other is an exterior pigment.

Q. How does the company sell leaded zinc oxide? Is that sold in drums or packages?

A. Fifty-pound paper bags.

Q. Do you know what territorial differentials are quoted on that product?

A. No, I am not familiar with prices. They are available to me anytime that I need them, but my work is of such a nature that I can always call and get prices when I need them. I know in a general way; but I don't know specifically today.

Q. You spoke of the houses that had been painted in Cincinnati with mixed paint and with pure white lead paint which showed a difference in color retention after a
3407 period of time. Do you know who painted those houses?

A. I don't at the moment. I know they were painted by master painters.

Q. But you don't know whether the methods or techniques of applying the paint on those two structures were identical, do you?

A. I would say for all practical purposes they were identical.

Q. Do you know that of your own knowledge?

A. Not of my own knowledge, because I was not present at the time; but I can tell from the looks of a job whether it is good workmanship, mediocre or bad.

Q. Did I understand you to state that the customary price differential between dry basic sulphate and basic carbonate is a half cent a pound?

A. Yes, I made that statement.

Q. And you stated that the difference in costs in 1941 and '42 in the use of basic sulphate or basic carbonate was six or seven cents a gallon. Is that correct?

A. Depending on the particular type of formulation, but the formulation which was most popular at that time, considering the basic white lead sulphate and leaded zinc oxide, its saving was, as I stated, between six and seven cents a gallon in favor of the basic white lead sulphate.

Q. Approximately how many pounds of lead pig-
3408 ments were in those paints per gallon?

A. Let us see. About 12 pounds—yes, about 12 pounds of pigment in a gallon of paint, of which in the case of white we will say 65 percent was the average lead content of the particular paint I have in mind. You must remember at that particular time we had gone into that period of transition when our ideas on the formulation of paint were changing, eventually resulting in the type of paint which we are using so extensively today, which is a lower lead content paint.

Q. Now, up to that time isn't it true that there were on the market a number of high quality paints which contained anywhere from 10 to 14 pounds of lead pigments per gallon?

A. No, I wouldn't say, not unless you are thinking of straight basic white lead carbonate paint where the pigment is entirely based on white lead carbonate. The average mixture weighed about 16 pounds to a gallon in those days, and with 4 pounds of oil present and maybe a half a pound of thinner and dryer, it was 4.5 from 16, which leaves 11.5. Keep in mind now that we were going through the transition stage, and 65 to 70 percent white lead was commonly used in the pigmentation, so 70 percent of 11 would be in the order of 7.5 to 8 pounds per gallon.

Q. Aren't there still paints on the market which contain a very high percentage of basic carbonate or
3409 basic sulphate white lead?

A. You must distinguish the type of paint. If you are referring to so-called ready-mixed pure white paint, which is essentially paste white lead reduced with oil and put into ready-mixed paint form, then there is an appreciable quantity of 100 percent pigment paint. But it all depends on what we mean by large.

In 1923 we figured we couldn't make a good paint without at least 65 to 70 percent white lead present. Today we have evidence to show, both on test fences and in the matter of several years' experience on houses, that we can make good paints with 30 percent white lead content, providing we have a judicious, proper combination of pigments.

Q. Now, this so-called controversy that you had between carbonate and sulphate, which ended with the TT-P-25 in 1943 on primer specifications, who did you notify of your agreement or acquiescence in that specification at that time?

A. That was such a long drawn out affair. I talked to Mr. Hickson about that, chairman of the committee.

Q. And told him the Eagle-Picher Company was willing to go along with that specification?

A. As he finally reached it, but you must remember that that specification dragged out for months and months and months, and we had I guess reams of statements and millions of words for and against one or the other,
3410 or any combination of the two. And also keep in mind that the Army at that time was needing paint

We didn't have this great shortage of paint until subsequent to 1942.

Q. Did the Lead Industry Association take any part in that controversy?

A. Not to my knowledge. I believe Mr. Wormser was called in by Mr. Hickson as an authority, and Mr. Vogelsang of the Tin-Lead-Zinc Branch, but they were called in only on account of the War Production Board having been in existence, or what was then called the Office of Production Management, and any changes in raw materials of a chemical nature, including paint, were not made without first consulting the proper office in the War Production Board, or its predecessor agencies.

Consequently, Mr. Vogelsang, who headed the Tin-Lead-Zinc Branch was called in to at least one meeting to state his views, and I think we brought Mr. Wormser along as a witness, and Mr. Wormser may have been invited by the committee. Mr. Hickson endeavored to be very thorough, very fair and very impartial in handling this matter, because in mind that we were at that transition period between a high lead paint and a low lead paint, and he wanted the Government to have the benefit of all modern technology, and yet he wanted to be fair in his dealings with everyone.

Due to the war situation, and the connection of
3411 these people with the War Production Board, several of the people were called in on the committee who would not in ordinary times have been invited, or whose opinion wouldn't have been considered.

Q. Was there not a very serious shortage of lead during the war?

A. At times a very serious shortage. At times there was plenty of lead.

Q. Did the shortage of lead in any way affect the Government's consideration of the specifications on these mixed paints?

A. Yes, it did.

Q. Tending to reduce the content, the minimum lead content in mixed paints?

A. No, it did not work to reduce—as I recall it, it did not work to reduce the minimum lead content of the paint. What reduced the lead content in the paint was a natural development of the technology of paint, which extended a decade before the war, but which was brought to a head

by mere coincidence at just about the time of the war, and at times during the war there was plenty of lead.

Q. Going back to blue lead now and its composition, what is the metallic lead content of blue lead?

A. Approximately 70 to 72 percent.

Q. That compares with what metallic content of 3412 the high grade red lead?

A. Red lead is 90 percent.

Q. Does that account in large part of the price difference which exists between those two commodities?

A. It may be one factor.

Mr. Wright: I have nothing further.

Trial Examiner Norwood: Redirect?

Mr. Wood: No redirect examination.

Trial Examiner Norwood: Call your next witness.

Mr. Wood: I would like to suggest an adjournment until tomorrow morning.

Mr. DuBose: May I join in that request?

Trial Examiner Norwood: Is this witness discharged, or do you want to bring him back?

Mr. Wood: Discharged.

Trial Examiner Norwood: The witness is discharged.

(Witness excused.)

Trial Examiner Norwood: We will recess until 10 o'clock tomorrow morning.

(Thereupon, at 3:45 o'clock p. m., an adjournment was taken until the following day, Wednesday, July 23, 1947, at 10 o'clock a. m.)

3413

Hearing Room,
Federal Trade Commission,
Washington, D. C.,
July 23, 1947.

Met, pursuant to adjournment, at 10:00 a. m.

Before:

J. W. Norwood, Trial Examiner.

Appearances:

Edmund T. Wood and Richard Serviss, American Building, Cincinnati, Ohio, representing Eagle-Picher Company and Eagle-Picher Sales Company.

3414 E. Z. DuBose, 120 Broadway, New York, New York, representing National Lead Company.

Henry E. Gardiner, 25 Broadway, New York, New York, representing Anaconda Copper Mining Company and International Smelting & Refining Company.

James T. Welch, 815 15th Street, N. W., Washington, D. C., representing The Sherman-Williams Company.

Joseph S. Wright and Paul R. Dixon, representing the Federal Trade Commission.

3415 PROCEEDINGS.

Trial Examiner Norwood: The hearing will come to order.

Pursuant to adjournment of yesterday the hearing is now reconvened at 10 o'clock a. m., Daylight Saving Time, on July 23, in Room 332, Office of the Federal Trade Commission, Washington, D. C. The appearances are as follows:

Joseph S. Wright and Paul R. Dixon appearing for the Federal Trade Commission.

Edmund T. Wood and Richard Serviss appearing for Eagle-Picher Company and Eagle-Picher Sales Company.

E. Z. DuBose appearing for National Lead Company.

Henry E. Gardiner appearing for Anaconda Copper Mining Company and International Smelting & Refining Company.

James T. Welch appearing for The Sherman-Williams Company.

You may call your witness.

Mr. Wood: Mr. Harner, please.

Trial Examiner Norwood: Will you give me your full name, please?

Mr. Harner: Harold R. Harner.

HAROLD R. HARNER, was thereupon called as a witness for the respondents Eagle-Picher Company and Eagle-Picher Sales Company and, having been first duly sworn, testified as follows:

3416 *Direct Examination by Mr. Wood.*

Q. Mr. Harner, will you please state your residence and occupation?

A. I am chief chemist of the Eagle-Picher Company and also assistant research director with my residence at Joplin, Missouri.

Q. Will you please state your education?

A. I am a graduate in chemistry cum laude from Westminister College at Fulton, Missouri.

Q. After leaving Westminister what did you do?

A. I went into the employment of the Eagle-Picher Lead Company at Joplin, Missouri, directly from school.

Q. In what capacity?

A. As a worker in the research department.

Q. How long did you occupy that position?

A. That was from 1924 until 1927.

Q. And what did you do next?

A. I was in the employment of Mr. J. H. Calbeck in the Calbeck Laboratories at Joplin, Missouri, doing contract work for the Eagle-Picher Company.

Q. What was the nature of your research work at Eagle-Picher and also in your next association?

A. My work at Eagle-Picher was primarily on
3417 storage batteries at that time, although I did a good deal of other work, not storage batteries. During the interim when I was with Mr. Calbeck our work was on the reclaiming of values from storage battery plates.

Q. How long were you with Calbeck?

A. Three years.

Q. And what position did you take next?

A. I returned to the Eagle-Picher Lead Company as chief of the storage battery division in the research department.

Q. Have you been in the employ of the Eagle-Picher Company ever since?

A. I have.

Q. What have been your duties and responsibilities over that period of employment?

A. From the time I returned in 1930 until 1935 I was in charge of the storage battery division of the research laboratory. Beginning in 1936, the first of the year, I became chief chemist of the research laboratory and assistant to Mr. McMullen, the research director. About 1941 I became chief chemist of the entire company.

Q. What is the condition of Mr. McMullen's health at the present time?

A. Mr. McMullen is confined to his home with hypertension at the present time.

Q. And is unable to testify in this case?

3418 A. That is right.

Q. Can you give us an over-all picture of the business of the Eagle-Picher Company, that is, just broadly, the fields in which the company is engaged and the general nature of its manufacturing efforts, as you understand them?

Mr. Wright: I am going to be required to object to that question unless it is amended so that the answer will clearly be from this witness' own experience as chief chemist of the company.

Trial Examiner Norwood: Well, haven't you pretty well covered that anyway?

Mr. Wood: I don't think so, I don't think there is anything in the record.

Trial Examiner Norwood: I will ask the witness to testify from his own experience.

Mr. Wood: That is perfectly all right as a qualification.

Trial Examiner Norwood: Go ahead.

The Witness: You want the scope of the company's activities?

By Mr. Wood:

Q. Just generally.

A. The Eagle-Picher Lead Company is engaged in the production of, primarily, raw materials or heavy chemicals from lead and zinc, or lead and zinc ores. Their sub-
3419 sidiary, the Eagle-Picher Mining & Smelting Company produces lead and zinc ore from the mines, has mining properties, concentrating plants and smelters.

The Eagle-Picher Company's activities include not only pigments but insulation and metal goods as well.

Q. Where are the mining properties of the Eagle-Picher Company?

A. The major mining properties are in the so-called Tri-State field of Missouri, Kansas and Oklahoma, centered between Joplin, Missouri, and Picher, Oklahoma. They have another new field in the so-called Tri-State field of Illinois, centering about Galena, Illinois, and extending into Wisconsin and Iowa. They also have properties in Mexico and Arizona.

Q. What is the nature of the ore which is mined in the Tri-State district about Joplin?

A. The ore in the Tri-State field is quite unusual in that the lead ore, for example, is substantially free from silver and bismuth and is quite different from any other ore except that of the Tri-State Illinois field which resembles it very much. It is also another ore that is substantially free from silver and bismuth.

Q. What, if any, significance is there to that freedom from silver and bismuth?

A. This freedom from these two impurities makes it possible to use these ores directly in the production of
3420 pigments, whereas if silver and bismuth were present the ores could not be used directly in their manufacture.

Q. Will you please give us a brief over-all summary of the duties and responsibilities of the research laboratory?

A. Of course the primary duty of the research laboratory is to maintain the competitive position of the company both in regards to the technical services furnished in regard to the quality and types of products produced, and in regard to the development of new products as needed to meet competition and keep the company in their position in industry.

Now, we have other responsibilities. The research labor-

atory coordinates the plant development laboratories, and the plant control laboratories. Each plant has a control laboratory and a number of them have developed laboratories working on their specific products.

Q. Will you explain what you mean by the plant laboratories and the control laboratories, other than your laboratory?

A. All of our products are sold on very rigid specifications which require analyses of the product continuously. We must know that every barrel or lot of production meets the specifications. For example, at the Joplin litharge or lead oxide plant every barrel of lead oxide must be analyzed before it is accepted and checked for shipment.

We make so many different grades that it requires very complicated testing to be sure that each barrel or
3421 each lot, where lots are made, meet the specifications.

That is true in every plant, we have laboratories controlling them each chemically now. In addition we have developed laboratories in a number of plants to handle the specific problems of that plant.

For example, at East Chicago the laboratory is working on white lead and the recovery and refining of lead from secondary sources. We must keep those processes improved and this requires a staff at that point, in addition to the regular laboratory research staff at the central laboratories at Joplin.

Q. Could you give us a list, Mr. Harner, of the control or research laboratories that you know about, other than the central laboratory at Joplin, with which you are connected?

A. Yes.

Q. Would you do so, please?

A. There is a control laboratory at our zinc smelter at Henrietta, Oklahoma; a control laboratory and a development laboratory at our plant at Galena, Kansas, where basic sulphate is produced; there are two control laboratories and a development laboratory in the Joplin plant. There is a control laboratory and a development laboratory in the diatomaceous earth plant at Clark, Nevada.

There is a control laboratory at East St. Louis. There is a control laboratory at the zinc oxide plant at
3422 Hillsboro, Illinois—two control laboratories. There is a control laboratory at our lithochrome plant at Argo, Illinois. There is a control laboratory and a devel-

opment laboratory at our East Chicago plant. There is a control laboratory at our white lead plant at Cincinnati. There is a control laboratory and a development laboratory at our metal goods plant at Cincinnati.

There is a control laboratory at our metal goods plant at Dallas, Texas. There is a control laboratory at our Wabash, Indiana, insulation plant. There is a control laboratory at our Newark lead oxide plant.

I may have missed some, but I am certain of all those named.

Q. Now, what is the relationship of the Joplin laboratory, at which you are assistant research director, to the other laboratories of the company?

A. It is my duty as chief chemist of the company to supervise all of the control laboratories, both in regard to the tests conducted and the methods of test.

It is our duty as a research department to correlate the work of all the development laboratories so that it all goes forward on one unified plan.

Q. Now, in answer to one of the earlier questions, you mentioned technical service. Will you explain what you mean by technical service?

3423 A. Our technical service takes many forms which are brought on by the fact that we have such a diversity of small customers, many of whom do not have development or engineering laboratories. In order to provide them with the means to be competitive in the trade, we provide them with technical information both as to our products and as to how these products should be used, and we also assist them in designing or developing the products which they wish to manufacture.

I can give an example. During the war, on the batteries for tanks and Diesel batteries, only a few of the larger companies knew how to make these batteries. We designed the battery completely, including the size of the grids, the number of plates, the amount of material that must go in each plate, and submitted that information to all of our battery customers, enabling them to produce successfully for the Government these needed batteries.

Q. Did those batteries require special oxides or special blends of oxides, or particularly selected blends?

A. They did.

Q. And who made the selection?

A. We did.

Q. Now, what if any is the relationship between the research laboratory and the sales department of the pigments division?

A. The research between the laboratory and the sales department of the pigments division is very close.
3424 Every man in the sales staff of the pigments division is a technical man who services, as far as he can, his customers. If he cannot take care of their needs, then the research laboratory is called in, either by members of that department, or by transmittal of this information from the salesman or the technical representative to the laboratory where the problem may be worked on in the laboratory, and the solution reached which will enable the problem to be whipped.

Q. Who trains the salesmen, the technical salesmen in the pigments division?

A. The research laboratory.

Q. How do they train them?

A. Every new salesman or sales candidate is sent to research for a period of at least six weeks, ordinarily three months, and sometimes a year, where they go through a regular course of study in our products and the use of those products, and the technology which we have developed in regard to them, and also in regard to the field in which these products are used, so that when they go out they can understand the customer's problems and work with him in servicing the customer and keeping him competitive.

Q. What is the purpose of this working relationship between the research laboratory and the technical salesmen of the pigments division?

A. The purpose is fundamental in our principle of
3425 operation, because unless we can supply this technical information to the customer, we would have no position. Our position is built, and our competitive situation is based on technical service.

Q. Can you explain why your competitive position is based on technical service?

A. I don't know as I can very well. That is an involved subject, because it has been our principle of selling and our principle of working ever since I have been with the company. It is the only way we have been able to remain competitive in the industry.

Q. There was testimony yesterday with regard to test

fences erected by the company. Do you have any familiarity with those test fences?

A. I do.

Q. What is their purpose?

A. Their purpose has several phases. It began as a study of all the different types of pigments to find out exactly the properties of each one in paint. We stepped up from that to combinations of these pigments to find the joint properties, or shall we say synargy, because sometimes when you add two things together you don't get the expected result.

Then we combined three pigments, and went on until
we knew pretty well what would happen with any
3426 combination of pigments in paint.

That developed a mass of basic information from which we can then postulate formulations and check directly the exact paint formulations to be used in the trade.

Now, in addition to trying out the final definite formulas we developed, of course we studied current paint formulations in use in industry, securing samples of paint on the open market with which to compare the formulas which we are developing and studying.

Q. How long do you expose your panels on test fences?

A. That depends on the type of protection that is expected. On wood paints, it will vary, in the case of normal paints, from three to six years. In the case of metal protective paints, it may take ten years to complete a test.

Q. In other words, you leave one panel on a fence for that length of time?

A. That is right.

Q. During the history of your test fences, how many panels, approximately, have you exposed altogether, just approximately?

A. I believe our panel numbers are in the 20,000 somewhere at the present time, because they have been listed serially.

Q. Now, the collated information obtained from the test fences is available to whom?

A. To any of our customers. The reports are submitted. As soon as a piece of work or a section is
3427 completed, the report is written and submitted to the sales department, the technical division at Cincinnati, where it is made available through these salesmen to any customer to whom it will be of use.

Q. How about prospective customers?

A. I should say customers, or prospective customers.

Q. Has any information obtained from the test fences ever been presented to any governmental bodies?

A. It has.

Q. Which ones?

A. Quite a number. The Paint Group in Washington here Mr. Goetz spoke about yesterday; the Maritime Commission. I know it has been presented to the Navy, to many public roads or state road commissions; the Panama Canal Commission; the United States Engineers. I believe the Navy Department of Aeronautics during the war, when we did some work on aviation paints.

There are probably more, but I am not too familiar with all the places to whom this information has been submitted.

Q. What is your understanding of the term "mixed paint"?

A. My understanding of the term "mixed paint" is a paint in which two or more, and usually three, four or five different pigments are blanded so that the best combination of properties is secured for the purpose for 3428 which that paint is being produced. It is ready-mixed with oil, thinner, dryer and any other ingredient needed to make it ready to use on opening the can.

Q. Will you give us an example of the formulation of what you would consider a very high quality outdoor white house paint?

A. At the present time our formulations would probably be in the order of 35 percent lead sulphate, in the order of 25 to 35 percent zinc oxide, 12 to 15 percent TiO_2, titanium oxide, and the balance of the pigment as an inert, such as asbestine or magnesium silicate, the whole ground in a mixture of raw linseed oil and bodied linseed oil.

Q. Now, how would such a paint compare with a pure lead carbonate white paint, say when manufactured by the Atlantic Division of National Lead Company?

A. I should say it would be superior to the white lead. White lead has certain deficiencies as a single pigment which are quite well known.

Q. Well known by whom?

A. The industry, the paint industry.

Mr. Wright: Your Honor, I move that that answer be stricken from the record. There has been no basis laid to

show that this witness has compared any such formulations he has testified about with the specific product produced by the Atlantic Branch of the National Lead Company.

3429 Mr. Wood: We will ask him whether he has or not.

By Mr. Wood:

Q. Have you ever tested out a pure white lead carbonate paint of the Atlantic Branch of the National Lead Company?

A. I cannot say of any branch. We have tested many white leads from the National Lead Company.

Q. You are not sure of the branch?

A. I wouldn't say about the branch.

Trial Examiner Norwood: Have you tested out the Dutch Boy brand?

The Witness: Yes.

By Mr. Wood:

Q. It was Dutch Boy brand that you were testing?

A. Yes, sir.

Mr. Wood: Off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Mr. Wright: I still submit there hasn't been any proper basis laid that the witness has compared any specific paint to which he has testified with that paint.

Trial Examiner Norwood: I think you can cross-examine him on that.

Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

3430 By Mr. Wood:

Q. Now, on this test fence, Mr. Harner, do you test the products of competitors?

A. We do.

Q. Have you ever tested pure basic carbonate white lead paint made from Dutch Boy brand of the National Lead Company?

A. We have.

Q. And of pure white lead carbonate paints made from Eagle white lead?

A. We have, many times.

Q. Have you compared the properties of such paints with the properties of mixed paints of the formulation which you gave us just a moment ago?

A. We have.

Q. And how do those properties compare?

A. The findings indicate the mixed paint to be more satisfactory. White lead tends to check and discolor in service, and then chalk rather badly, although as far as protecting the surface on which it is laid, it gives good protection. But in appearance it is not as good.

The mixed paint will give protection and good appearance over a longer period of time.

Q. By white lead in your last answer, you meant basic carbonate white lead?

A. That is right in this case.

3431 Q. Which is the cheaper of the two paints?

A. The mixed paint will be cheaper to produce than the basic carbonate white lead.

Q. Can you tell us how many different lead pigments the Eagle-Picher Company manufactures?

A. Yes.

Q. Will you please name them, all of them?

A. We produce at least three kinds of basic sulphate white lead, basic sulphate blue lead, lead silicate, anhydrous lead silicate, white lead or the silicate white lead, the carbonate white lead, several types of red lead, five or six distinct processes or types of litharge with very many modifications in each type. We produce lead formate. We produce special silicates, such as our trade-marked Alsilox, which is a lead alumino-silicate. We produce the leaded zinc oxides, if you wish to include them, of which there are about six main types, and some thirty modifications. We also produce lead peroxide.

Q. Now, does your laboratory obtain samples of competitors' products and analyze their properties?

A. Yes.

Q. How extensively?

A. Whenever any product is brought out by a competitor, a number of samples are secured both to get information as to the product itself and as to its variability

3432 and range of properties. Then from time to time additional samples are secured on all competitive products so that we may keep posted if there is any change from the original material as brought out.

Q. Is that done systematically or haphazard?

A. Rather systematically. It isn't always possible to get samples just when we want them, but as nearly as possible, it is a systematic procedure.

Q. Now, have you ever analyzed any of the lead pigments of the National Lead Company?

A. We have.

Q. How many of them?

A. I couldn't give you a number. It is a great number, but I couldn't give you an actual number.

Q. Well, on the basis of analyzing the products of National Lead Company, what is your estimate as to the relative number of lead pigments manufactured by National Lead Company and the Eagle-Picher Company respectively?

A. From what I have seen, the National Lead Company produces a lesser number of products than Eagle-Picher in lead pigments.

Trial Examiner Norwood: I believe he is trying to find out how many are common to both, how many qualities both the concerns produce.

The Witness: Do you wish a further answer?

3433 Trial Examiner Norwood: Go ahead and ask a question.

Mr. Wood: Was Your Honor asking for the number of products that were exactly alike or the two companies?

Trial Examiner Norwood: Yes, of the two companies.

Mr. Wood: I think I can ask it in a way that will bring it out.

Trial Examiner Norwood: I will withdraw my question.

By Mr. Wood:

Q. His Honor was inquiring, Mr. Harner, in respect to the number of products which are common to the two companies, that is, the National Lead Company and the Eagle-Picher Company, so I am going to ask you, for instance, in respect to basic lead carbonate what are the similarities or differences in the products of National Lead Company and the Eagle-Picher Company, as far as carbonates are concerned?

A. As far as carbonates are concerned we both produce a range of carbonates to give different properties in paint but they are comparable ranges of pigments. I would say there is no substantial difference in the carbonates in the ranges of materials produced.

Q. How about the red leads intended for this paint grinders' industry?

A. The red lead, again we produce similar lines of material although we started the use of an extremely
3434 fine red lead which was made from sublimed litharge and the National took steps afterwards in order to match the product but at the present time our lines of paint grinders' red lead are comparable.

Q. Do you manufacture any lines of paint grinders' red lead that National doesn't manufacture now?

A. Not at the present time.

Q. But you have in times past?

A. Yes.

Q. And National has followed your lead in products?

A. That is right.

Q. In regard to blue lead does National have a comparable product?

A. As far as I know National Lead Company does not manufacture a product comparable to our blue lead.

Mr. Wood: Off the record a moment.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

By Mr. Wood:

Q. Now, do you know whether National puts out leaded zinc oxide?

A. I do not think they do, in fact I am rather certain National does not put out leaded zince oxide.

Q. What are the comparative qualities of the
3435 Eagle-Picher basic lead sulphate and the National basic lead sulphate?

A. I have only seen one type of National basic lead sulphate which was a precipitated lead sulphate. We make three types, of which the precipitated is a minor item.

Q. What do you mean by precipitated?

A. A precipitated basic sulphate white lead is made by reacting a mixture of litharge, the lead oxide and water, with sulphuric acid in the correct proportions and under the right conditions to precipitate or throw down a lead sulphate of the right properties, which is then filtered, dried and milled for use.

Q. In other words, the product has to go through the pig lead stage?

A. The product has to go through the pig lead stage, the litharge stage.

Q. How about your lead sulphates?

A. The bulk of our lead sulphate is produced directly from lead ore, especially purified lead ore which is burned directly in a furnace like powdered coal to form the sublimed white lead fume.

Q. What is the relative cost of manufacture of the sulphate from the ore concentrate and from the pig lead?

A. I cannot give you exact figures. I have seen them but I know it is definitely lower in cost to produce the basic sulphate directly from ore rather than from pig lead.

3436 Q. What grade of ore is required to produce that type of sulphate?

A. It takes the type of lead ore produced in one of the Tri-State fields free from silver and bismuth and it must be further purified and chemically treated before it is burned to the sulphate.

Q. Do you know of any other lead ores in this country that could be so utilized?

A. None that I have seen.

Q. How about the basic silicate white lead, does National make that, do you know?

A. They make a basic silicate but it is not a white lead, it is rather a basic silicate chemical compound for other uses. From our examination of the pigment it does not appear to be a paint type of pigment material, that is, the National product.

Q. Do you know of any National product that is the functional equivalent of your basic white lead silicate?

A. I do not.

Q. Now can you name any other lead pigments going to the paint grinders manufactured by Eagle-Picher other than those you have named, which National does not make?

A. Offhand, no.

Q. Has your research laboratory devoted any work to the development of blue lead or basic lead sulphates

3437 or basic lead silicate white lead?

A. Oh, yes.

Q. How much in general over a period of years?

A. That work has been continuous for, well, over the entire period there has been work conducted and it has been intensified. I should say on the average that on those three pigments which you named for the past ten years

there have been at least from six to ten men continuously employed on that group of three pigments.

Q. Has there been any particular emphasis on the research work on those particular products?

A. Definitely.

Q. Why?

A. Because they are particularly adapted to the Eagle-Picher setup. The basic sulphate white lead and the basic sulphate blue lead, especially so, since we control ore bodies from which we can make these pigments and we can make them economically so that we can make some money on them and sell them to our customers economically.

In addition to that their properties, as demonstrated by our tests, are superior.

Q. Superior to what?

A. To the competitive products such as carbonate white lead in the case of the red lead, and basic sulphate in the case of the blue lead.

3438 Q. Now turning to the battery oxides, how many different oxides of lead are there?

A. I would have to name them. I think there are about five.

Q. Please name them.

A. We have the PbO, lead monoxide, which is known ordinarily as litharge; we have Pb_3O_4, lead tetraoxide, known ordinarily as red lead. We have Pb_2O_3, the lead sequi-oxide which is not widely used but may be in the future.

Then there is a new one, the Pb_5O_8, which is not named and which has only been determined by X-ray to exist. Lastly there is the PbO_2, lead peroxide, which is the material which is in the positive plate of the storage battery. It is also used in industry for an oxidizing agent.

Q. Of those five oxides you have named how many does your company manufacture?

A. Three at the present time, the monoxide litharge, red lead and the peroxide. We do not manufacture the Pb_2O_3 or the Pb_5O_8, that is, not to our knowledge, there may be some mixed in the other materials.

Trial Examiner Norwood: Does National manufacture the three that you do?

The Witness: I am not sure about the lead peroxide. They manufacture the other two and they may manufacture the peroxide, but I don't know.

3439 By Mr. Wood:

Q. Now, are these various types of commercial oxides which you have named equivalent to each other? I mean, is every litharge just like everyother litarge or are there different types?

A. They are not. There are two physical modifications of litharge or PbO that are identifiable by X-ray, the tetragonal and orthonhomic crystal forms. In addition to that each manufacturing process produces an oxide of different properties, such as chemical reactivity or stability or rate of formation in a battery plate so that we have six different manufacturing properties at the present time for making litharge.

Q. By "we" do you mean Eagle-Picher Company?

A. I mean the Eagle-Picher Company.

Q. Why does the Eagle-Picher Company employ so many different methods of making one chemical?

A. The needs of our many customers are so diverse that in order to supply them with precisely the material which will give them the best results we produce litharge by all of these different processes.

Q. Do you know whether the National Lead Company sells that many litharges?

A. I don't believe they have quite as many; I think they have four or five different types of litharge. I

3440 think we have one or two more types than they have.

Q. Now, are your litharges and the National Lead Company's litharges exactly the same?

A. No.

Q. They are not?

A. Our processes are not identical with theirs. They are comparable but not identical.

Q. Do the litharges of the two companies exhibit different properties when utilized in battery manufacture?

A. Yes.

Q. Such as what?

A. It is necessary to adjust the formulations in the battery plates, sometimes only slightly but in every case necessary when you go from one oxide to another. It is just as necessary between National and ours as it would be between any of the six modifications of ours. In other words, the adjustment would be, perhaps, only in the amount of fluids which had to be added to the mixture in making the paste; it might be in the type of fluids which

had to be added; it might be the formation of the plates which would be different.

Q. By formation of the plates do you mean the electrical charging?

A. The initial electrical charging which converts the material in the plates from the original lead oxides into the final material.

3441 Q. By formation you do not mean the physical construction?

A. No, I do not.

Q. You mean the electrical development?

A. The electrolytic conversion.

Q. In making the switch from one company's oxide to the other do those variations have to be scientifically determined for the best results?

A. That is right, they do.

Q. In other words, you couldn't guess and get a good result?

A. No. In fact, there have been instances, and many, where such a change was made inadvisably and without proper examination where trouble, and serious trouble, was experienced; not that adequate results could not have been secured had this examination and changes been made.

Q. Well, for instance, if the Eagle-Picher Company is selling a battery oxide to an account which formerly used a National battery oxide, what type of service do you give the customer in connection with taking over the account?

A. We will study their process and get the details, then in our laboratory we will duplicate as near as we can that process and by selection we can tell which modifications of our oxides should be adaptable to that process.

We will then try that selected group and see which one does the best in that process, then we will select that one, or possibly two, and make a plant test in the

3442 plant, just a single barrel or single test, and if that is satisfactory we will run a larger batch until we are assured it is giving the result we want.

Q. Are you able to catch up with National?

A. I think we are ahead.

Q. What is your effort in giving that type of service?

A. What is our effort?

Q. Yes, what are you trying to do?

A. To maintain our position in the field; that is how we get business.

Q. Are you trying to improve on National?

A. No, we are trying to improve on ourselves. We are already ahead of them, I think.

Q. In 1930 when you went back with the Eagle-Picher Lead Company did National Lead Company give any service at that time in connection with its sale of battery oxide?

A. To my knowledge, very little.

Q. Did the Eagle-Picher Company?

A. Yes, we did. We had ten men in the battery laboratory at that time in 1930.

Q. Has the giving of service to customers continued since that time?

A. Yes.

Q. On the part of Eagle-Picher?

A. Yes, it has.

3443 Q. Do you know whether or not at some point National Lead Company commenced to give service?

A. Yes, they did. I can't give the exact year but about 1940, possibly 1939, they hired a number of people and enlarged what had been a small battery laboratory to one that is comparable to ours at the present time, in size. I was told quite proudly by the National Lead representatives of the wonderful new laboratory they had and we began to see their men in the field there.

Q. Is there competition now between the two companies in the giving of technical service to customers in connection with the sale of battery oxides?

A. Very intense at the present time.

Q. How many grades of red lead do you manufacture for the battery trade?

A. We manufacture about, I believe, eight or nine different grades of red lead for the battery industry—shall we say types, rather than grades?

Q. Types?

A. That is right.

Q. Are those battery red leads the same as the red leads that are sold to the paint grinders?

A. No, they are not the same.

Q. Are they manufactured in the same batches, or anything like that?

3444 A. They are made in the same furnace but from different base materials and handled differently throughout the manufacture.

Q. So that the products are not interchangeable?

A. No.

Q. Do you know how many battery red leads the National Lead Company puts out?

A. No, I don't. They have several but I don't know the exact number.

Q. Can you estimate whether it is more or less than the number you put out?

A. Less, I think.

Mr. Wright: Objection, Your Honor, the witness already stated he doesn't know. He knows they have several, now he is asked frankly for a guess.

Trial Examiner Norwood: Read the question and answer.

(The record was read.)

Trial Examiner Norwood: I think he can give his impression about that.

Mr. Wright: Your Honor, that is something that can be determined by testimony. I don't want the record to show National Lead Company produces less on the basis of the witness' guess, when he has already stated he doesn't know.

Trial Examiner Norwood: He is just giving his opinion there.

3445 Mr. Wright: It isn't an opinion, it is a guess, an estimate after stating that he didn't know.

Trial Examiner Norwood: Did he state he didn't know?

Mr. Wright: Yes, sir.

Mr. Wood: Well, it seems to me that the witness has a right to state his impression or opinion there. After all, the point of this testimony is that the Eagle-Picher Company at least thinks it is competing successfully with National and if the laboratory thinks they put out a greater variety of red lead for competitive purposes than National, it shows the spirit and intensity of the competition.

Mr. Wright: He knows how many Eagle-Picher puts out, which I think he stated as nine; he doesn't know how many the National Lead Company puts out. I think it is improper for him to guess that National puts out less.

Trial Examiner Norwood: I will overrule the objection and let him answer that. Off the record.

(Discussion off the record.)

Trial Examiner Norwood: We will take a five-minute recess.

(A short recess was taken.)

Trial Examiner Norwood: Are you ready to proceed?

Mr. Wood: I have a few more question of the witness.

3446 By Mr. Wood:

Q. Mr. Harner, what is the Eagle-Picher plan of merchandising battery oxides?

Mr. Wright: I object to that, Your Honor. It hasn't been shown that this gentleman has had anything to do with the merchandising of these products. He has been a chemist and research man in the laboratory, by his own testimony.

Mr. Wood: I will ask a preliminary question there, Your Honor.

Trial Examiner Norwood: All right, go ahead.

By Mr. Wood:

Q. Do you have any duties apart from technical research itself in furtherance of the Eagle-Picher plan of merchandising battery oxides?

A. I do.

Q. What are they?

A. In training the salesmen who are to sell these oxides in the field.

Q. What is the Eagle-Picher plan of merchandising battery oxides?

A. The Eagle-Picher plan, as we teach it to the salesmen, is to sell these oxides as specialties, to fit them to the customer's individual needs.

Q. What is the purpose of that plan?

3447 A. The purpose of the plan has only one objective, and that is to maintain our competitive position in the field as compared with our larger competitors.

Q. Mr. Harner, have you ever prepared and delivered any technical papers before any technical societies?

A. I have.

Q. Approximately how many?

A. I have delivered about ten papers before the National Association of American Battery Manufacturers. I don't recall the exact number, but two or three before the Electrochemical Society, of which I am a member.

Q. What was the purpose of delivering these papers?

A. The papers before the National Battery Manufacturers Association was to distribute and make available generally to the battery industry the major findings of our laboratory in regard to storage battery technology.

Mr. Wood: You may cross-examine.

Trial Examiner Norwood: Cross-examine.

Cross-Examination by Mr. Wright.

Q. These processes for production of pigments directly from the concentrates, Mr. Harner, how many of the pigments of the Eagle-Picher Company are produced in that fashion?

A. The basic sulphate white lead, the bulk proportionate of our sulphate. We do have two other processes,
3448 but the bulk of our sulphate white lead is produced by that method. The blue lead is also produced by that method. Some of our co-fumed leaded zinc is produced directly from ore, and all of our zinc oxide at the Hillsboro plant is produced directly from zinc ores, which wasn't mentioned before.

Q. How about litharge?

A. No.

Q. In other words, you must process that from pig lead?

A. That is right.

Q. Red lead is in the same category?

A. That is right.

Q. And basic carbonate?

A. That is right.

Q. Now, does the Eagle-Picher Company produce, or have they ever produced orange mineral?

A. Yes.

Q. How is that produced?

A. Our orange mineral is produced by our sublimed litharge, using a special grade of sublimed litharge, and not from lead carbonate or white lead carbonate as is the customary method.

Q. Then this advantage you were speaking about on the processing directly from concentrates is confined to the products we are principally concerned with, lead sulphate and blue lead?

3449 A. And leaded zinc oxide.

Q. Now, do you produce a product, leaded zinc oxide, from one operation, or is it a combination?

A. We have two different processes for producing leaded zinc oxide. In one it is produced in a single operation in which the product is known as co-fumed leaded zinc oxide produced simultaneously from a mixed lead-zinc ore. In the other, the basic sulphate white lead is produced separately from the pure zinc oxide, and then by selection of the two to get exactly the properties desired, they are

blended together into what is called our blended leaded zinc oxide.

Q. Now, you sell those leaded zinc oxides, don't you, in percentage grades of 50 percent leaded zinc and 35 percent leaded zinc, and so forth?

A. 5 percent leaded zinc, 35 percent leaded zinc, 50 percent leaded zinc, 60 percent leaded zinc, and 70 percent leaded zinc. The latter two are specialties.

Q. Those are your specialties?

A. Yes.

Q. Now, can you reach those percentages by that co-fumed method?

A. About 50 percent is the maximum that can be reached by co-fuming, and that is rather difficult, I believe, from what I have seen.

Q. Now, most of those percentages grades then are
3450 produced by the double process of mixing zinc oxide and basic sulphate, then?

A. We make the higher grades out of 35 percent leaded zinc by adding more lead to it. You see, we can add more lead to sublimed basic sulphate white lead, to the 35 percent leaded, and bring up the lead content.

Q. Now, these technical services that you make available to paint manufacturers, battery manufacturers, and others, they are made available to everyone in the trade?

A. That is right.

Q. Customers and prospective customers alike?

A. That is right.

Q. Irrespective of size?

A. That is right, whatever is necessary to take care of the needs of the customer, or the customer or potential customer. Remember that I do not necessarily mean customer when I use that term.

Q. Now, are you aware of the battery oxides, or have you tested them, that are produced by the Metals Refining Company?

A. Yes.

Q. Do you know whether they maintain technical research for battery manufacturers?

A. At the present time, I don't know. I assume so, but the man who was there is no longer with them, Dr. Johnson. They did maintain such service.

3451 Q. In other words, they would give service, so far

as you know, to a battery manufacturer to make their oxides meet his processes?

A. Some. They had a small laboratory.

Q. And the National Lead Company does the same thing?

A. At the present time they are very active in servicing.

Q. Now, you were discussing a comparable formula of mixed paint containing 35 percent lead sulphate, 25 percent zinc oxide, 15 percent titanium dioxide, and the remainder inert?

A. As an approximate formula of the type.

Q. That is only one of probably thousands of formulas for paint?

A. That represents a typical good present formula today.

Q. There are many other formulas which will vary either way on content of any of those materials?

A. It is obvious to you that the possible combinations and permutations are infinite, although you might get over in a bad range if you go too far over in any one constituent.

Q. Now, as to merits or qualities of these different formulae, are there differences of opinion in the paint trade among manufacturers of pigments as to what the best formula might be?

A. Oh, yes. Each man has his pet formula.

Q. That is just your—.

A. That is based on our information.

3452 Q. —opinion?

A. Opinion if you wish. It is not just an opinion, but on our findings on our test fence and our laboratories; not just opinion only. It is based on those findings.

Q. Now, some of the other opinions in the trade have been based on findings on technical research, too, have they not?

A. That is right.

Q. Are you familiar with the ready-mixed white paint the Eagle-Picher Company at one time marketed?

A. I know they have such a product, and we have tested it.

Q. Do they presently market that product?

A. I think so, though I don't know. I assume they do, for I haven't heard otherwise.

Q. Do you know what the formula of that paint is?

A. As far as I know, it is straight white lead with linseed oil and thinner.

Q. What form of white lead is used in that?

A. The basic carbonate white lead.

Q. Are you familiar with the processes of manufacture that were employed in the Evans Lead Company plant at Charleston, West Virginia?

A. By hearsay from people who work at that plant.

Q. Have you tested any of the materials from that process of manufacture?

A. We have.

3453 Q. What materials do they produce there, do you know?

A. I don't know what they produce now, but at the time we tested them, they produced sublimed litharge, and what they called mechanical litharge, and of course the red leads made from the two litharges.

Q. Do you know of any unique processes they might have developed there in the Evans Lead plant?

A. I do not.

Q. In the mid-'30's?

A. I do not.

Q. You have stated that in order to switch the purchasers of battery pigments from one producer to another, the battery manufacturer would have to make changes in his technical processes?

A. Yes.

Q. He would also have to make changes if he switched from one type to another that you manufacture?

A. That is right.

Q. I take it that your organization is always willing to advise a customer of National or Metals Refining on just what technical changes would be necessary in order to switch from their product to yours, is that not true?

A. That is right.

Q. That is one of the purposes of your organization?

A. Yes.

3454 Q. The same would be the case with National or Metals Refining, I assume, in connection with a customer of yours that they desired to secure?

A. Yes.

Q. So that all the principal producers stand ready to give that service?

A. At the present time they do.

Q. You are aware of the problems in the battery manufacturing field, I take it, from our experience?

A. Yes.

Q. Are there any battery manufacturers located in Joplin, Missouri?

A. There is one battery manufacturer in Joplin, a small one—no, there are two manufacturers now.

Q. What are the names of those companies, do you recall?

A. The Ebart Battery Company, and I don't recall what the other is. I suggest you ask Mr. Chubb when he is on the stand.

Q. Are they customers of yours, do you know?

A. Yes.

Q. Both of them?

A. Yes.

Q. What batteries are sold principally in and around the area of Joplin?

A. As far as I know, all nationally advertised
3455 brands are sold in that area.

Q. Were there any batteries of the Vitalic Company sold in that area?

A. I expect so.

Q. And all the nationally known products?

A. Yes.

Q. —are also sold there?

A. Yes.

Q. Some of those nationally known battery manufacturers are also your customers. Is that correct?

A. They are.

Q. Which ones do you recall, just offhand?

A. That are our customers?

Q. Yes, of the nationally known ones.

A. Oh, National Battery Company, Globe-Union Company.

Q. Globe-Union is in Milwaukee, is that correct?

A. Yes.

Q. And you ship to them from Joplin?

A. I think so; I think that is where it is shipped from.

Q. I assume they would be carload purchasers?

A. Yes.

Q. Is that the manufacturer of the batteries that Sears-Roebuck sells?

A. Globe-Union, yes.

Q. What type of purchasers are these two small
3456 battery companies in Joplin? Are they carload purchasers?

A. I don't know whether they have ever reached carload scale or not; I don't know. They are small scale, that is all I can say.

Q. Can you estimate about how many batteries a day they put out in those plants—50 or 100?

A. No, I suggest you ask Mr. Chubb that question.

Q. Mr. whom?

A. Chubb.

Mr. Wood: He will be the next witness.

By Mr. Wright:

Q. What instructions to salesmen do you give regarding the pricing of your product?

A. Nothing. We know nothing about that.

Mr. Wright: No further examination.

Trial Examiner Norwood: Redirect.

Redirect Examination by Mr. Wood.

Q. You were asked about nationally known battery manufacturers who were customers of Eagle-Picher. You named several. Do you know whether or not any of the nationally known battery manufacturers manufacture their own battery oxides?

A. Yes, I do.

Q. To what extent do they manufacture their own 3457 battery oxides, as far as you know?

A. As near as I could tell, about 50 percent of the oxide used in batteries is manufactured by the battery companies, these larger battery companies.

Q. Which battery companies, for instance, manufacture their own oxides?

A. The Electric Storage Battery Company, which includes Exide and Willard; the Electric Auto-Lite Company, which includes Prestolite and U. S. Lite; the Dual Storage Battery Company.

Q. Is that a National Battery Company subsidiary?

A. It is a subsidiary of the National Battery Company. The Delco Company, which is a subsidiary of General Motors. The Bowers Battery Company of Reading, Pennsylvania. I believe that is all the larger companies that manufacture their own oxides.

Q. Do any of those companies buy red leads for batteries?

A. Yes, they do.

Q. Do they buy litharges?

A. Only, I believe, for special purpose batteries, or to supply capacity at peak production periods when they cannot make enough.

Q. Now, Mr. Wright asked you whether or not you were familiar with the problems of battery manufacturers, and you said that you were. What particular type, if any,
3458 of battery manufacturers did you have in mind?

A. We are familiar with the problems, the technical problems—I should qualify it to that extent—of the battery industry with the exception of a few of the companies who make all their own oxides.

Q. You mean the larger companies?

A. Yes.

Q. Then you are familiar primarily with the problems of the smaller companies?

A. That is right.

Q. And what is your objective in giving these smaller companies all of this technical service and research?

A. Because it doesn't pay to have all your eggs in one basket. We have spread our business among the smaller customers, and given them the service to spread and diversify our sales of oxide, and thereby better maintain our competitive position in the industry.

Q. And what effect, if any, does that have on their competitive position in respect to the larger companies that manufacture their own oxides?

A. It maintains their competitive position. Without our help at times they wouldn't have stayed in business.

Mr. Wood: That is all.

Recross Examination by Mr. Wright.

3459 Q. Did I understand you to say the Bowers Company has its own oxide plant?

A. So I understand. I have not seen that particular installation.

Q. Where did you obtain your information?

A. Through a group who make equipment for battery manufacturers.

Q. You don't know whether that is true or not?

A. I have not verified it myself. I was told through an equipment group. It is hearsay in that sense.

Q. Do you know where this plant was reported to be located?

A. At Reading, Pennsylvania.

Q. Where is the plant of the Autolite Company, the oxide plant?

A. They have two that I know of, one at Niagara Falls at the U. S. Light plant and one at Speedway, Indianapolis.

Q. What is the capacity of those plants, do you know?

A. Not exactly. I have seen the oxide plant at Speedway, I know that that oxide plant exists and is operating.

Q. How about the Gould plant?

A. It is located at Depew, New York.

Q. Does Gould make the SLI type of battery?

A. They make some SLI type batteries, but they are primarily manufacturers of heavy duty batteries.

Q. Industrial batteries?

3460 A. Industrial batteries.

Q. With the exception of Gould all of the others that you mentioned as having plants, Electric Storage Battery Company, Autolite, Delco and Bowers are primarily in the field of SLI batteries, is that correct?

A. I wouldn't say that the Exide branch of Electric Storage Battery Company was primarily a SLI manufacturer.

Q. I didn't understand you to say it was the Exide branch.

A. That is one of the two branches, there are the Grant and Willard branches.

Q. What is their interest in Grant Company in Minneapolis?

A. I understand that Grant is a wholly-owned subsidiary of Willard Storage Battery Company.

Q. What is Willard's relation?

A. It is a wholly-owned subsidiary of Electric Storage Battery Company, as I understand it.

Q. Do the Willard branch and the Grant branch—or subsidiaries, if you will—manufacture their own oxides?

A. I don't know whether the Grant division of Willard makes its own oxide, or not, or whether they are supplied by Willard from one of their other oxide factories.

Q. Can you tell me what you would judge the minimum consumption of oxides would be which would make

it economical for a battery manufacturer to produce his own oxides and erect his own plant?

3461 A. I wouldn't know.

Q. Would it be a substantial tonnage?

A. It would be my impression it would have to be a substantial tonnage.

Q. So that only a very large company could do that?

A. At least a large company.

Q. Either a large or a very large company?

A. That is right.

Q. No small or medium sized battery company could produce its own oxides in a modern oxide plant?

A. I don't believe so.

Q. You spoke of promoting the competitive position of the small battery manufacturers? Back in the mid and late '30's what was the position of the small battery manufacturer in competition, can you tell me that?

A. Well, they were at their worst position at the time the NRA went into effect.

Q. Did that condition continue for several years thereafter?

A. No, they improved because we were able at that time to show them how to make batteries meeting the requirements of the NRA Code.

Q. Was it a highly competitive field, the battery industry?

A. Extremely competitive.

Q. Was it competitive in a price way?

A. There was a price war until the NRA days.

3462 Q. Were batteries sold at extremely low prices in the period subsequent to the NRA by some of the companies?

A. I don't recall such severe price competition after that period.

Mr. Wright: No further examination.

Mr. Wood: No further questions.

Trial Examiner Norwood: Thank you, Mr. Harner. You are excused.

(Witness excused.)

Trial Examiner Norwood: Call your next witness.

Mr. Wood: Mr. Chubb.

Trial Examiner Norwood: Give me your full name, sir.

Mr. Chubb: M. F. Chubb.

M. F. CHUBB was thereupon called as a witness for the respondents Eagle-Picher Company and Eagle-Picher Sales Company and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Wood.

Q. Will you please state your residence and occupation, Mr. Chubb?

A. I live in Joplin, Missouri, and am employed at the Research Laboratories of Eagle-Picher Lead Company.

3463 Q. Will you please tell us what your education was?

A. I got my B. S. degree at Baker University in Baldwin, Kansas, and my Master's degree at Massachusetts Institute of Technology.

Q. In what year?

A. 1933.

Q. What did you do after you graduated with your Master's degree from the Massachusetts Institute of Technology?

A. Started working at the Eagle-Picher laboratories immediately after graduation.

Q. Incidently, who offered you your position with the Eagle-Picher Company?

A. Dr. Schaeffer at that time was in charge of the research and it was through him and Mr. Harner I got my position.

Q. Did you know Mr. Zoller at that time?

A. No, I didn't know him at that time.

Q. He is an M. I. T. graduate too, isn't he?

A. That is right.

Q. What were your duties at the time you went to work for the Eagle-Picher Company in their research laboratory?

A. Well, in the usual fashion I started out as a helper and a laboratory boy. I was put in the battery research division and did whatever was to be done in that department.

Q. Are you still in that department?

A. That is right.

3464 Q. Have you been in that department continuously over that period of years?

A. I have.

Q. Will you tell us the different duties and responsibilities you had during your employment by the Eagle-Picher Company?

A. Well, I started out as a laboratory helper and within the next year or two I was called on to do sales service work, and I think in 1940 or 1941 I was placed in charge of all the storage battery research in the department.

Q. Will you explain what you mean by the term "sales service work"?

A. That is helping the salesmen to apply the information and technology which we gather in the laboratory, applying it to use with and for our customers so as to improve our position in using our product in our customers' plants.

Q. What do you mean by improving your position?

A. Well, just trying to do a better job than the other guy with respect to oxides, mostly, to improve our competitive position.

Q. Why do your customers require this sales service?

A. Well, many of them, in fact in number most of our customers are relatively small accounts and they do not have the facilities and manpower or technology back of them to do the best job which we think is possible with our products. In order to keep them using our products to the best advantage we have to show them not only how to use our products but give them basic information on how to make storage batteries by any process which they happen to be using or which we would like to put in in their plant.

3465

Q. Do your customers compete with the major battery manufacturers who make their own oxides?

A. Very much so, yes.

Q. Do you ever examine any of the batteries put out by any of the major companies which make their own oxides?

A. Quite frequently we do, yes.

Q. What is the relative quality of the batteries put out by your customers under your direction and the batteries put out by the major companies, to which I have referred?

A. To the best of our ability it is to our interest to make our customers' batteries just as good as those batteries, and I think we do.

Q. Why?

A. Because it would mean that it would be only a matter of time until our customers went out of business if they couldn't equal those manufacturers' products.

Q. Can you give us some examples of the type of technical sales service you give to your customers, just typical examples of various types of service?

A. I think one early one which would probably
3466 stand out would be our early work with the NRA when a test was placed on the trade whereby guarantees of batteries were based on 20-hour rates. At that time no one knew anything about 20-hour rates except some of the larger manufacturers. It was evidently through their influence that tests were put in.

We had to develop information to meet that test so that it would be available to the many smaller manufacturers who were our customers.

Another example would be negative expanders. We keep a continual program in force trying to improve so-called negative expanders, which are addition agents for improving the cold capacities. During my stay with the company we probably increased the capacity of the negatives in that respect almost 100 percent.

Another example would be in drying plates—

Q. I was speaking of the sales service rather than your company's actual developments, that is, the type of sales service which you would give these smaller companies.

A. Well, a recent one would be actually helping, assisting in the setting up of a small battery plant which they didn't know how to set up, or, really, the processes that went into it. We were asked to show them what materials and equipment were necessary and we did so in the hope that by so doing we would get the business. That happens quite frequently.

Q. How many different battery oxides does your
3467 company make at the present time?

A. You mean—

Q. Different types of battery oxide.

A. Different products available to the battery industry?

Q. That is right.

A. There are probably in the neighborhood of 100.

Q. Do you know whether or not the National Lead Company puts out an equal number of products in the way of battery oxides?

A. Well, I could only answer that by saying I have

certainly never seen nearly that number in the trade and I would assume that they do not.

Q. What is the purpose of putting out such a large number of battery oxides?

A. That is done in order to be of greatest assistance to any one customer. Every customer, every plant seems to have its own peculiar problems which require a special oxide or a special process and if it can be solved by making a special product we would like to do it.

There are also variations in climatic conditions over the country which require different types of negatives or positives. Incidently, a single all-purpose battery just isn't available. It takes a lot of variations, where you want to emphasize one quality over another and it is through all these variations both in performance and in manu-
3468 facturing facilities that we feel so many of our products are a good thing to go to our customers.

Q. How do you determine which product goes to which customer?

A. We first probably make a survey of the particular problem at hand. If a plant was running we would go in and study their process. He might or might not be having difficulty, or he might have something peculiar in the process which required emphasizing certain characteristics. After a study of all those factors we select the product or actually make a new one which we think will do the best job in that particular situation.

Q. Since you have been with Eagle-Picher Company what major developments has the Eagle-Picher research laboratory made in the battery field? You can refer to your notes there, if you wish, Mr. Chubb, if you have made any.

A. I think you can take them by steps. Of course, we consider the availability of so many different oxides is an important contribution to the battery industry because it allows people to make lots of different kinds of batteries, which was especially true during the past war when special purpose batteries were very much in need.

As I mentioned before in the early days we did develop the information that contributed to the battery in-
dustry's methods for meeting the 20-hour capacity
3469 and actually improved those capacities through the years in the past. Those capacities have been stepped up 15 or 20 percent in the last ten years.

In the mixing of the paste which is one of the initial steps in making a battery, we have developed methods for mixing which improve the quality, uniformity, and actually cut costs in that they reduce the scrap in the plant. That information has been published so that it is available to the industry.

In pasting, while we have not had any part in developing pasting machines themselves we certainly played a part in adapting materials to be used with those pasting machines and have made a continual study of the pasting machines being developed at all times and have developed products and methods of processing to fit those pasting machines.

In drying the plates, another early step in processing, we very early made a study and contributed to drying plates and replaced the earlier so-called pickle process where all plates were dipped in acid. Under the new process they are dried in either batch ovens or continuous ovens and we worked out schedules where these plates could be dried.

More recently we have developed a so-called damp process and the equipment for promoting that process whereby the plates are only partially dried. It has many advantages and is being accepted quite extensively
3470 throughout the trade. In conjunction with this equipment we have also changed other processes so as to get the full benefit in that it reduced the forming time.

Q. What do you mean by forming time?

A. That is the first charging of a battery. It reduces the time that is necessary for a battery to stay in a plant being charged before it can be either put in stock or shipped out. That works in with the processor equipment which I mentioned before.

Q. Did you mention Chubb processor?

Mr. Wright: Your Honor, I am going to object to any further questions along this line. It has absolutely no relevancy in this proceeding at all. It is cumulative. It has no bearing that I can see on the essential charges of price fixing and price discrimination in this case. I appreciate the Eagle-Picher Company is a fine company and they have done a lot of research work, but I think we have had that described fully enough for the purpose of this proceeding.

Mr. Wood: This is the last question along that line,

Your Honor, and we say it has a relevance to the case in this respect: If there were definite evidence of conspiracy here in this case instead of just a few circumstances from which the Commission requests that the inference of conspiracy be drawn, I agree that this would not rebut
3471 direct evidence, but when there is only inferential evidence then by showing the money being poured into continuous, keen competition in research we say it is one factor from which the inference of price leadership could be drawn.

Mr. Wright: I object to counsel's statement that there is no direct evidence of conspiracy in this case.

Trial Examiner Norwood: Counsel's statement is not taken as evidence. I will overrule the objection and let him answer the question.

Mr. Wood: Let me finish this question, then I have just one more question which is slightly different.

Trial Examiner Norwood: Go ahead.

By Mr. Wood:

Q. Did you mention the Chubb processor?

A. That was mentioned indirectly; the plate processor, that is the Chubb processor.

Q. Is that a drying machine?

A. That is a machine for processing plates between the pasting machine and the forming process.

Q. Do any other major developments come to mind?

A. Of course at the present time a process has been developed and will be used for high acid formation where the batteries are only formed in a single acid rather than in the conventional formation where you charge and then dump, then recharge after you fill it with strong acid again.

3472 Q. What, in your opinion, has been the effect of the Eagle-Picher research on competition in the battery industry?

A. Well, it has certainly tended to keep our customers in a competitive position.

Q. What in your opinion has been the technical resultant of the Eagle-Picher research, as far as the improvement in the quality of storage batteries is concerned?

A. I think we have been one of the leaders in any improvement that has gone on in batteries, certainly since I have been with the company, and probably for a short time before that.

Q. Does your company now have a contract with the Signal Corps to perform research work in storage battery development?

A. Yes, it does, and has had for the past three years.

Q. And apart from that work for the Signal Corps, which I imagine is restricted, is all of your research and service available to all customers and prospective customers?

A. Yes.

Mr. Wood: Cross-examine.

Cross-Examination by Mr. Wright.

Q. Your research services are available, as you said, to all in the field, that is, large, small medium sized and giant battery companies, is that correct?

A. That is right.

3473 Q. Has the availability of your research laboratory and your technical assistance been used as a sales argument to the large battery manufacturers to purchase oxides from you, rather than make their own?

A. Will you state that question again, please?

Mr. Wright: Would you read it to him, please?

(The question was read.)

The Witness: I don't believe I am in a position to answer that.

By Mr. Wright:

Q. Do you cooperate with the sales department on these matters?

A. To a certain extent, but there are some large manufacturers, as you class them, whose plants I never get into.

Q. Are there some whose plants you do get into?

A. That is right.

Q. You give them technical assistance?

A. That is right.

Q. Who are they?

A. Well, among them would be National Battery Company—I believe you classified your size as large.

Q. I am speaking of companies in the size range that have sufficient consumption of oxides so that they could conceivably make their own oxides rather than purchase from you. National Battery would be one of them?

3474 A. That is right; Price battery.

Q. That is in Reading, it is not?

A. That is in Hamburg, Pennsylvania. Then there is Solar.

Q. Where is that located?

A. Milwaukee. They have one plant at Milwaukee.

Q. You do considerable technical work with them, do you?

A. Yes.

Q. Improving their process?

A. Yes.

Q. Do most of the large battery companies have research staffs of their own?

A. Yes, they do.

Q. Are they in any way comparable to the research staff which you maintain?

A. Certainly.

Mr. Wood: Objected to, unless the question is qualified as to whether the questioner means quantitatively or qualitatively.

Mr. Wright: I asked in any way are they comparable. If the witness knows in what way they are comparable he can answer.

Trial Examiner Norwood: I think we can clarify that later. Objection overruled. Do you want the question read?

The Witness: Yes.

3475 (The question was read.)

The Witness: I think I will have to ask you what you mean by comparable. I was perhaps in error in answering yes.

By Mr. Wright:

Q. Can you compare the research staff engaged in research on battery manufacturing problems at the Solar Company, with yours, from the point of size?

A. Taking that one in particular they have a smaller staff.

Q. Do you think it is in any way comparable in quality or extent of research with your own research department?

A. I would say the quality of the work that they do would be comparable to ours. However, the quantity wouldn't be.

Q. The extent?

A. Well, I classify quantity and extent as the same thing, unless you have something else in mind.

Q. Do you furnish technical services for Globe Union?

A. We have worked with them.

Q. Do you sell oxides to Grant in Minneapolis?

A. At the present time we do not.

Q. Have you in the period, say, from 1936 to 1942?

A. It would be a very small amount.

Q. Do you have any customers in the State of Texas to which you supply oxides for battery manufacture?

A. I don't believe that I am qualified to answer
3476 that right now. That could be a changing condition. I don't know whether we are selling anyone down there, or not.

Q. You don't recall furnishing services down there?

A. Yes, I do recall furnishing services there.

Q. Do you recall the two battery companies that Mr. Harner mentioned, located in Joplin?

A. There are two located in Joplin, Lead Products Company and Ebert-Allen Company.

Q. Are you familiar with those two operations?

A. Yes, I have been in the plant a number of times.

Q. Have you furnished services to them?

A. We do.

Q. What is the capacity of the Ebert-Allen plant?

A. Well, they have recently made a change. Right now I would say they have a capacity of 100 batteries a day.

Q. What is the change that you mentioned?

A. They have moved into larger quarters.

Q. When was that move?

A. In the past two months.

Q. What was their capacity prior to that move?

A. During last winter I think they made about 50 to 60 batteries a day.

Q. About what is the capacity of the Lead Products Company?

A. I would put it in the same category.

Q. Are they carload purchasers of oxide, do you know?

3477 A. Ebert-Allen is not. I think that the Lead Products Company have purchased carload quantities.

Q. You don't know that they always purchase in that quantity?

A. They haven't at all times, I know that; but I don't know just what you would classify as a carload purchaser.

Q. Are you familiar with the pricing schedule for these oxides?

A. No.

Q. You don't know anything about the territorial differentials applied?

A. No, I don't know a thing about it.

Q. The differentials between five ton and carload, and less than five-ton prices?

A. I know there is a difference, but the extent to which it differs I don't know.

Q. Are you familiar with competitive conditions in the battery business as far as the problems that your customers in that industry have faced during the last ten years or more?

A. Yes.

Q. What has been the situation generally of the smaller battery manufacturers in competition with Willard, Delco or Autolite? Is he generally—and I am speaking now in the period from 1936 to 1942—able to sell his battery for as high a price as the larger battery manufacturer?

3478 A. I don't know. I think that some have. I think a lot of that is a local condition. You have to take each individual instance.

Q. You don't think any general statement of general application could be made, then, that the small battery manufacturer is usually at a price disadvantage over the large nationally advertised product?

A. No, I don't think so.

Q. I am talking now of the period from 1936 to 1942.

A. Yes. I am not qualified to make a statement.

Q. Well, you testified you were familiar with these problems and had been in and done research and helped these manufacturers out with their problems. Certainly you must know something about what those problems have been.

Mr. Wood: Is there a question?

Mr. Wright: Yes.

Mr. Wood: Is that a question?

Mr. Welch: There is no question.

The Witness: What is the question? Where do we stand now?

Mr. Wood: The witness doesn't understand that as a question.

Mr. Wright: I would like to be permitted to make my own cross-examination.

Trial Examiner Norwood: Read the question.

3479 Mr. Wright: I made a statement to the witness for the purpose of refreshing his recollection in a further attempt to get an answer to the question about which he said he couldn't recall.

Mr. Wood: The witness was hesitating because there was no question.

Trial Examiner Norwood: Go ahead.

By Mr. Wright:

Q. Do you know—and I will repeat the question again—that it was generally the case in the period from '36 to '42 that the small local battery manufacturer was able to command as high a price for his product as the nationally advertised brands such as Willard, Exide, Autolite and Delco?

A. I still don't know what the question is.

Mr. Wright: Will your read the question, please?

Trial Examiner Norwood: Read it.

(The question was read.)

The Witness: I don't believe that the smaller manufacturers which you speak of did charge as much as these larger manufacturers.

By Mr. Wright:

Q. Do you recall in the period from '36 to '42 that some of the larger manufacturers quoted storage batteries at very low prices, comparatively speaking?

A. Did you say some of the manufacturers?

3480 Q. Some of the large manufacturers.

A. I don't recall that with batteries sold under their own name, no.

Q. Do you recall it with private brand batteries that weren't sold under their own name?

A. Yes.

Q. What do you recall about that?

A. Well, I think at one time you could buy cheaper batteries, probably around $3.

Q. What effect did that have in your experience on the competitive problems of the small battery manufacturer, speaking now of operations comparable to Ebert-Allen and the Lead Products ventures?

A. Well, I believe most of those fellows tried to meet that competition not by coming down in price, but by giving a different kind of service in the locality.

Q. Did it create a serious competitive problem for them?
A. Oh, yes, I think so.
Mr. Wright: No further questions.
Mr. Wood: Nothing further.
Trial Examiner Norwood: Thank you, Mr. Chubb.
(Witness excused.)
Mr. Wood: That is all I have in the way of witnesses, Your Honor.
Mr. Wright: You mean at this hearing?
3481 Mr. Wood: At this hearing.
Trial Examiner Norwood: Are there any further witnesses by any of the other respondents?
Mr. Gardiner: I have none, Your Honor.
Trial Examiner Norwood: Well, I suppose that since all counsel are not here, we had better meet at 2 o'clock, and I will discuss those issues with you for awhile.
Mr. Wright: May we go off the record for a moment?
Trial Examiner Norwood: And also to let counsel put their requests on the record for future hearings, and so forth.
(Off the record.)
(Discussion off the record.)
Trial Examiner Norwood: After discussion with counsel off the record, I have decided to adjourn the hearing to reconvene in Washington, D. C., Office of the Federal Trade Commission, at 10 o'clock a. m., City Time, on September 16, 1947.
Mr. Wright: It is my understanding that we will run fairly continuously at that time until we have completed respondents' testimony?
Trial Examiner Norwood: We will run as continuously as possible.
Mr. Welch: I would like to state for the record at this time that I have commitments in the case of F. T. C.
3482 vs. R. J. Reynolds Tobacco Company for the week beginning September 22 in Indianapolis, Indiana; the week beginning September 29 in New York, New York; the week beginning October 6 in Washington, each of those settings being, as far as I know, for one week; and also a hearing in Winston-Salem, North Carolina, for the week of October 27. With those exceptions, I will be available at any date in September or October.
Trial Examiner Norwood: Well, I will state that we have made our calendar with deference to the requirements of Mr. Welch and his firm heretofore, and we have

refrained from doing some work in July because he was engaged, and so on, and I feel that after September it will be incumbent upon him to make arrangements in these other cases so that we can go on with this case. I am requesting him to do the best he can in that respect.

Mr. Welch: Your Honor, with all due deference, I do not recall that I resisted in any setting of hearings in July on my account, or that I resisted the setting of any in June. I don't know that any hearing has heretofore been postponed on my specific request.

Trial Examiner Norwood: I will add that we had a conference with counsel about adjusting these hearings, and I had one with Mr. McIntyre with relation to these hearings, and we have a great deal of trouble adjusting
3483 these hearings so that Mr. Welch can try more than one case before the Commission at a time. I am willing to make all reasonable concessions to him, but I don't think that I can adjourn this hearing another month on that account when there are other counsel in his firm who can be here when he is not introducing evidence for his particular client.

Now, I think you can make some arrangement where we can live and let live, and make it possible for us to go ahead with reasonable diligence to try the rest of this case, and I will ask counsel to give a good deal of thought to it. In the meantime, we will adjourn until September 16, as stated.

(Thereupon, at 12:40 o'clock p. m., an adjournment was taken until September 16, 1947, at 10 o'clock a.m., in Room 332 Federal Trade Commission Building, Washington, D. C.)

3484

Hearing Room,
Federal Trade Commission,
Washington, D. C.,
September 16, 1947.

Met, pursuant to adournment, at 10:00 a.m.

Before:

J. W. Norwood, Trial Examiner.

Appearances:

E. Z. DuBose, Attorney for the Respondent National Lead Company. (120 Broadway, New York, New York.)

Edmund T. Wood and Richard Serviss, Attorneys for Respondents Eagle-Picher Sales Company and Eagle-Picher Lead Company. (American Building, Cincinnati, Ohio.)

3485 Henry E. Gardiner, Attorney for Respondents Anaconda Copper Mining Company and International Smelting & Refining Company. (120 Broadway, New York, New York.)

James T. Welch, Attorney for Respondent The Sherwin-Williams Company. (815 15th Street, N. W., Washington, D. C.)

Joseph S. Wright and Paul R. Dixon, attorneys for the Federal Trade Commission.

3486 PROCEEDINGS.

Trial Examiner Norwood: The hearing will come to order.

Pursuant to adjournment on the 23rd of July, 1947, hearing in Docket 5253 is now reconvened at 10 o'clock a. m., on the 16th day of September, 1947, in Room 332, Office of the Federal Trade Commission, Washington, D. C.

The following counsel have appeared:

James D. Ewing and E. Z. DuBose appearing for the National Lead Company.

Edmund T. Wood and Richard Serviss appearing for Eagle-Picher Company and Eagle-Picher Sales Company.

Henry E. Gardiner appearing for Anaconda Copper Mining Company and International Smelting & Refining Company.

James T. Welch appearing for The Sherwin-Williams Company.

Joseph S. Wright and Paul R. Dixon appearing for the Federal Trade Commission.

You may call your witness.

Mr. Gardiner: If Your Honor please, I would like to call Mr. Frank Hurless.

FRANK H. HURLESS was thereupon called as a witness for the respondent International Smelting & Refining Company and, having been first duly sworn, testified as follows:

3487 *Direct Examination by Mr. Gardiner.*

Q. Will you please state your name and address?

A. Frank H. Hurless, Lowell, Indiana.

Q. At the present time, what is your occupation?

A. At the present time I am employed by the International Smelting & Refining Company in the Midwest area as a special representative. My duties consist right now mainly in the purchase of copper scrap for refining at Anaconda, Montana, and Perth Amboy, New Jersey.

Q. When were you first employed by that company?

A. In 1922.

Q. Will you kindly outline your activity with the International Smelting & Refining Company from that date down to the present, giving your various assignments with the company?

A. At first I was employed as a checker in the construction of a zinc oxide plant at Akron, Ohio.

Q. What time was that, when, what year?

A. 1922. My duties consisted in checking on the use of supplies and materials and the labor used in constructing the plant, as the construction was on a cost-plus basis. Subsequently I was in charge of the small plant office at Akron, Ohio.

In 1927 I began part-time sales work, and about 1929, as I recall it, I began full-time sales work.

3488 In 1929 I was transferred to the main office at East Chicago, Indiana.

In 1930, I was made district salesmanager and had charge of the dry white lead and zinc oxide sales in the Midwest area.

In 1936 I was made assistant salesmanager, and had charge of the sale of dry white lead, white lead and oil, and zinc oxide.

While assistant salesmanager, I virtually had charge of the sales of all territories, inasmuch as our official salesmanager, who was located in Akron, Ohio, had other duties which prevented him from giving full time to sales work.

Then in 1938 I was made salesmanager, and had full charge of the sale of dry white lead, white lead and oil, and zinc oxide in all territories.

Q. When did you first have anything to do with the sale of white lead and oil?

A. In 1931.

Q. The amended complaint in this proceeding defines lead pigments as the lead pigment commonly known in the industry as white lead, both basic carbonate and basic sulphate of lead, blue lead, red lead, or red oxide of lead, litharge or monoxide of lead, orange mineral and grinders' lead paste, such pigments as marketed either as dry products in the form of dry powder or in oil, in the form
3489 of a paste, after mixture with linseed or other oils.

What products covered by this definition have been produced by respondent, International Smelting & Refining Company?

A. Dry white lead and white lead and oil.

Q. Are those the only ones?

A. Yes.

Q. When did International first start to manufacture dry white lead?

A. In the latter part of 1936.

Q. Where was this operation conducted?

A. At East Chicago, Indiana.

Q. Prior to 1936, was dry white lead produced at the East Chicago plant of International?

A. Yes, it was.

Q. By what company was dry white lead produced prior to that time?

A. By the Anaconda Lead Products Company.

Q. Do you know what relation that company had to respondent, International, and respondent, Anaconda Copper Mining Company?

A. The Anaconda Lead Products Company was a sub-

sidiary of the Anaconda Copper Mining Company, as was the International Smelting & Refining Company.

Q. Do you know whether there was any subsequent change in this relationship?

3490 A. Yes, there was.

Q. Is the Anaconda Lead Products Company still in existence?

A. No, it is not.

Q. What became of it?

A. The assets and properties of the Anaconda Lead Products Company were taken over by the International Smelting & Refining Company.

Q. Is the Anaconda Lead Products Company as a company still in existence, do you know?

A. No, it was dissolved.

Q. Do you know when?

A. In the latter part of 1936.

Q. When did the Anaconda Lead Products Company first start to produce dry white lead?

A. In the latter part of 1919.

Q. And do you know when they first made sales of that product?

A. In the first part of 1920.

Q. Do you know how much of a factor this production was in the total output of dry white lead in the earlier years of production of that commodity by this company?

Mr. Wright: Objection, Your Honor. This witness is not shown to have been employed or to have had any contact with these products prior to about 1930.

Trial Examiner Norwood: In the question, how
3491 much of a factor, it seems to me the term "factor" is not very definite. You must show any percentages within the knowledge of this witness.

Mr. Gardiner: I will withdraw that question.

Trial Examiner Norwood: Yes.

By Mr. Gardiner:

Q. Are you familiar with the figure showing the production of the International Smelting & Refining Company of white lead during the period that it produced dry white lead?

A. I am.

Q. I hand you an exhibit and ask that it be marked Respondent's Exhibit No.—

Trial Examiner Norwood: I think it will be 190. I will ask the counsel to check.

Is the next respondent's exhibit 190?

Mr. Wright: I can ascertain that in just a moment.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. Wright: According to my records, it is 190.

Trial Examiner Norwood: Very well. We will mark it 191, to be safe.

(The document referred to was marked Respondent's Exhibit 191 for identification.)

By Mr. Gardiner:

3492 Q. I show you Respondent's Exhibit marked for identification No. 191, and ask if you have seen this document before?

A. Yes, I have seen these figures before.

Q. Do you know anything about their preparation?

A. They were prepared under my supervision.

Q. At whose request?

A. At the request of our counsel.

Q. What does this record purport to show?

A. This record purports to show the percentage of International's production of dry white lead of the total production of dry white lead in the United States for the years shown.

Q. What was the basis on which these figures were calculated?

A. The figures for the total production of dry white lead in the United States were taken from figures submitted by the United States Bureau of Mines. The figures for the production of International were taken from our records in our accounting department at East Chicago, Indiana.

Mr. Wright: I would like a few preliminary questions on that.

Trial Examiner Norwood: Very well.

By Mr. Wright:

Q. Mr. Hurless, in what form were the figures secured from the Bureau of Mines?

3493 A. Those figures are in the regularly published form of the Bureau of Mines. I think sometimes they are in book form or they can be secured by writing the United States Bureau of Mines direct.

Q. Were these secured from the publication of the Bureau of Mines known as the "Minerals Year Book"?

A. I do not know.

Q. Then you cannot tell me where we could have access to those figures?

A. Well, you could get the figures from the United States Bureau of Mines. But whether or not you would get them in the exact physical form we got them, I do not know.

Trial Examiner Norwood: Is that information confidential? Is that part of the confidential Bureau of Mines information?

The Witness: No, I do not think that this information is considered confidential, because my understanding is that anyone writing for it can secure it from the Bureau of Mines.

Mr. Wright: Your Honor, I realize that the Bureau of Mines does publish in its mineral year books figures on the total production of these various products and others. but I have no way of knowing whether these are the figures that appeared in the "Minerals Year Book", which is public information, or not.

By Mr. Gardiner:

3494 Q. Mr. Hurless, when were these figures compiled, do you recall?

A. I do not know the date, but I would say that it was probably a few months after this complaint was issued.

Q. And do you recall at that time what the request was so far as the compilation of these records with relation to securing the information on the world production? Was there any directive to you as to how you were to secure the figures on the United States production in this material?

A. Well, we were not told where we should go to get the figures; that is, whether from the "Minerals Year Book" or to write the United States Bureau of Mines. But I do know that at East Chicago we always maintained copies of the "Minerals Year Book" in our library. But whether or not these figures were actually taken from that or not, I cannot say.

Mr. Wright: Your Honor, may we go off the record just a minute?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Mr. Gardiner: I should like to offer at this time Respondent's Exhibit 191 in evidence.

Mr. Wright: Your Honor, I have no objection provided it is admitted subject to motion to strike later provided that the basic data from which this exhibit was com-
3495 piled is not made available on my request.

Trial Examiner Norwood: It will be admitted subject to that condition.

(The document referred to, heretofore marked for identification RESPONDENT'S EXHIBIT 191, was received in evidence.)

Mr. Gardiner: I ask that this document be marked Respondent's Exhibit No. 192 for identification.

(The document referred to was marked Respondent's Exhibit 192 for Identification.)

By Mr. Gardiner:

Q. I show you this document marked Respondent's Exhibit 192 for Identification, and ask you if you have seen it before?

A. Yes, I have seen these figures before.

Q. Did you have anything to do with their preparation?

A. They were prepared under my supervision.

Q. Where?

A. At East Chicago, Indiana.

Q. What do these figures purport to show?

A. These figures purport to show the percentage of sales by International of the total percentage of sales in the United States for the years specified.

Q. What is the basis on which these figures were calculated?

A. The figures for total sales in the United States were taken from figures supplied by the Lead Industries
3496 Association.

The figures for sales by International were taken from our records, in our sales department at East Chicago, Indiana.

Mr. Gardiner: I should like to offer in evidence Respondent's Exhibit 192 subject to the same qualifications as Exhibit 191.

Mr. Wright: I have no objection subject to the same qualifications.

Trial Examiner Norwood: It is so received.

(The document referred to, heretofore marked for identification RESPONDENT'S EXHIBIT 192, was received in evidence.)

By Mr. Gardiner:

Q. Did the Anaconda Lead Products Company and International sell dry white lead to the trade directly, or did they use a sales agent for some or all of their production?

A. They sold the dry white lead on a direct basis and through a sales agency.

Q. What was the name of this sales agency?

A. The Anaconda Sales Company.

Q. What connection did this sales agency have with respondent International or with respondent Anaconda Copper Mining Company?

A. The Anaconda Sales Company is a subsidiary
3497 of the Anaconda Copper Mining Company, as was International or is International.

Q. Why was the Anaconda Sales Company used as a sales agency?

A. Because in certain States it is licensed to do business where the International Smelting & Refining Company is not licensed to do business.

Q. To what class of trade did Anaconda Lead Products Company and International sell dry white lead?

A. They sold principally to manufacturers of paint and ceramic products.

Q. What was the price basis or system on which Anaconda Lead Products and International first sold dry white lead?

A. On the basis of f. o. b. East Chicago, Indiana, freight allowed.

Q. To any point in the United States?

A. As I recall it, that was the case.

Q. Was any change subsequent made in this pricing system?

A. Yes.

Q. What was it?

A. We established a par zone and a Pacific Coast zone.

Q. What do you mean by par zone?

A. The territory in the United States east of the Rocky Mountains was considered the par zone, and the territory west of and including the Rocky Mountains was considered the Pacific Coast zone.

3498 Q. What was the par zone? I understand it is part of the United States that was included within that group, but what distinguishes that from the Pacific Coast zone? What was the difference between them?

A. There was a difference in price of one-quarter cent per pound.

Trial Examiner Norwood: In favor of the par zone?

The Witness: That is right.

By Mr. Gardiner:

Q. Now, do I understand that the material was sold in the par zone f. o. b. where?

A. East Chicago, Indiana.

Q. Freight allowed?

A. Freight allowed.

Q. Within any part of the par territory?

A. That is right.

Q. And what was the situation so far as the Pacific Coast zone was concerned?

A. It was sold f. o. b. East Chicago, Indiana, freight allowed, the price being one-quarter of a cent per pound more.

Q. Why did these companies adopt this two-zone system for selling dry white lead?

A. Well, we adopted it because it was adopted by our competitors, and we went along on the same basis.

Q. How did you know that your competitors had such a system?

3499 A. Well, it was very easy for us to pick up information regarding our competitors' practices in the pricing of their products from our customers and prospective customers.

Mr. Gardiner: Will you read my last question, please, and the answer?

Trial Examiner Norwood: Read the question.

(The question and answer were read.)

By Mr. Gardiner:

Q. Now, so far as your competitors were concerned, how did you learn what their prices were?

Mr. Wright: Objection, Your Honor. That is repetitious.

Trial Examiner Norwood: No, let him answer. Objection overruled.

The Witness: Will you repeat the question, please?

(The pending question was read.)

The Witness: We could very easily learn what our competitors' prices were by asking our customers and prospective customers.

By Mr. Gardiner:

Q. How did you determine what your competitors' general selling tactics were? How did you determine that?

A. By making inquiries from our customers and prospective customers.

Mr. Wright: Your Honor, I object to this line of
3500 questioning because it is not restricted to any period of time. So far as we know, we have been talking about the period from 1922 to the present. It is not limited to any specific instance.

Trial Examiner Norwood: It applies to the time when they made a change in the par zone and Pacific Coast zone, and the operations thereafter. I think that is sufficiently definite. You may cross-examine him further on it.

By Mr. Gardiner:

Q. Did Anaconda Lead Products or International allow any quantity discount on the sale of dry white lead?

A. Yes, they did.

Q. What discount was allowed?

A. A discount of one-quarter cent per pound under the less carload price was allowed for carlots of 20 tons or more.

Q. Was this discount allowed in both the par and the Pacific Coast zones?

A. Yes.

Q. Why was such a discount made?

A. Well, we allowed such a discount because it was the general practice of competition.

Q. How did you know that that was the general practice of competition?

A. By contacting our customers and prospective customers we would learn what our competitors were doing pricewise.

3501 Q. Did your companies quote different prices to railroads and industrials?

A. Yes.

Q. Why were different prices quoted to railroads and industrials?

Mr. Wright: Your Honor, I object to this line of questioning. It is not restricted as to time. We are talking about another matter than the zone matter now.

Trial Examiner Norwood: You may clarify that.

By Mr. Gardiner:

Q. Subsequent to the adoption of the par and Pacific Coast zones, did your companies quote any different prices to railroads and the industrials?

A. Yes.

Q. Why were different prices quoted to railroads and industrials?

A. Well, we quoted different prices to railroads and industrials because competitors were likewise quoting such prices.

Q. How did you learn that your competitors were quoting different prices to these groups?

A. By contacting industrial and railroad accounts we would find out what our competitors were doing pricewise.

Q. Through what medium did you make this contact?

A. Usually through our salesmen.

Q. During the period subsequent to the adoption
3502 of the two-zone system, do you know generally what the profit and loss situation was so far as the production and sale of dry white lead was concerned?

A. Well, in a general way—

Trial Examiner Norwood: Answer yes, if you know.

The Witness: Yes, in a general way I know.

By Mr. Gardiner:

Q. What was the situation?

Mr. Wright: I object, Your Honor. What profit and loss situation might have been at a particular time is absolutely irrelevant to the issues of this matter.

Mr. Gardiner: If Your Honor please, I think it is very pertinent, because we are discussing the matter of pricing practices and the matter of competition, and it is important to determine what relation the pricing practices of a company had as to whether or not they were making or losing money.

Mr. Wright: Now, Your Honor, if that is counsel's purpose, to show that any one of the pricing practices had any effect on their profit and loss, it can hardly be established in this way. It is going to be necessary to get into the whole profit and loss structure of the company, and we are going to open up a field here that is going to be endless if we are going into the question of profit and loss as having anything to do with the changing or establishing
3503 of zone systems in this case.

Mr. Gardner: Well, of course the question has not been directed to the adoption of zone systems. The preceding questions dealt with prices so far as railroads and industrials were concerned, and I asked him if he generally knew what the situation was in that field, and the answer was yes. Now I have asked him what that situation in general was.

Trial Examiner Norwood: I think we are getting off the track here, I really do. I will sustain the objection.

By Mr. Gardiner:

Q. In the sales to railroads and industrials subsequent to the introduction of the par zone system, was any thought given to the sale of dry white lead at a price higher than that sold by your competitors?

Trial Examiner Norwood: Read that question, please.

(The pending question was read.)

Trial Examiner Norwood: You may answer.

A. No, I don't think we considered selling our dry white lead at a price higher than that of our competitors.

By Mr. Gardiner:

Q. Why not?

A. We could hardly be expected to get a premium for our product.

3504 Mr. Wright: Your Honor, I object to that, and I ask that the last answer be stricken. The witness said no consideration was given to the question of selling at a higher price.

Now, if no consideration was given to such a question, certainly it is improper to try to bring out that there was a particular reason for not giving consideration to the matter.

Trial Examiner Norwood: Well, he said that they gave no consideration, and now he is telling us why they gave no consideration.

Mr. Wright: If no consideration was given, obviously the matter never came up, and there was never any reason in anyone's mind.

In other words, the witness is already on the record that no consideration was ever given to that question. How can he have a reason in his mind, if the thing was never considered?

Trial Examiner Norwood: I will overrule the objec-

tion. I think he may tell us why they did not give serious consideration to selling the competitors. And I think he has already told us.

Did you say you could not get a higher price?

The Witness: I said that we could not be expected to get a premium for our products.

3505 Trial Examiner Norwood: Yes.

By Mr. Gardiner:

Q. Subsequent to the adoption of the two-zone system in the sale of dry white lead, did you ever sell that commodity at a price less than that sold by your competitors?

A. No.

Q. Why not?

A. The production and sale of dry white lead was not too profitable a business, and we felt that we had to get as much for our product as we possibly could.

Q. During the time that Anaconda Lead Products and International were producing and selling dry white lead, were they in competition with other companies?

A. Yes.

Q. What would you say as to the extent of competition that your company encountered on the sale of these products?

A. I would say that there was very stiff competition.

Q. Was Anaconda Lead Products or International able to improve their financial return through improvements in the methods of production?

A. To some extent.

Q. What improvements were made?

A. We discontinued our method of kiln drying dry white lead and substituted a mechanical Loudon dryer. Then we perfected a machine for mechanically wash-

3506 ing also lead anodes. In the handling of our finished product in the warehouse, we installed the best mechanical equipment to be used in piling it and for taking it from stock and loading it into cars and trucks.

Q. Did these improvements in the production of this material result in an increase in your net return from the sale of that product?

A. To some extent.

Q. Was that reflected in any change in your prices?

A. No.

Q. Why not?

A. Well, our experience over a period of years was that we constantly had to strive to get lower costs. When we succeeded in cutting the costs in one place, they were usually offset in another place; for example, by increased costs of materials, supplies and labor.

Q. You testified previously that the Anaconda Lead Products Company went out of the business of producing dry white lead and was succeeded by International.

When that occurred, was there any attempt made to change the pricing system for dry white lead?

A. No.

Q. Did anything occur in the trade in the late '20's or early '30's that had a major effect on Anaconda Lead Products' outlets for its production of dry white lead?

3507 A. Yes; we encountered increased competition, due principally to the expansion of the use of titanium pigments. We were forced to go into outlying territories that we had not solicited before in order to endeavor to maintain our volume of sales and production.

Q. You stated that due to this increased competition you had to go out and sell in an area outside of the production area. Was anything done outside of attempting to secure more sales and to increase your production of dry white lead?

A. Yes; we decided to go into the production and sale of white lead in oil.

Q. Was that the primary reason for entering the white lead in oil field?

A. I would say that it was the reason.

Q. What percentage of Anaconda Lead Products' and International's dry white lead production came to be used in white lead in oil?

A. Generally about 30 to 35 percent.

Trial Examiner Norwood: Will you read that question, please?

(The question was read.)

Mr. Gardiner: May I have the answer again?

(The answer was read.)

By Mr. Gardiner:

Q. Was dry white lead ever sold under consign-

3508 ment by either of your companies?

A. No.

Q. Do you know of any agreement on the part of Inter-

national with the other respondents in this proceeding, who are the National Lead Company, Eagle-Picher Lead Company, the Eagle-Picher Sales Company, the Sherwin-Williams Company, and the Glidden Company, for the adoption and maintenance of a system of delivered price quotations of dry white lead?

A. No, I do not.

Trial Examiner Norwood: Either or any of them?

The Witness: Either or any of them.

By Mr. Gardiner:

Q. Do you know of any attempt between International and any or either of the respondents just named in this proceeding for the adoption and maintenance of a plan whereby the United States is divided into zones for the purpose of selling dry white lead?

A. No, I do not.

Q. Do you know of any arrangement whereby International sought and secured advice, assistance and cooperation of the Lead Industries Association, its officers, employees and agents along with other respondents in this case previously mentioned in publishing and using non-competitive terms and conditions of sale in connection with the sales and offers to sell of dry white lead?

3509 A. No, I do not.

Q. Do you know if International ever used the office of the Lead Industries Association with the cooperation of officials of the same for the purpose of exchanging price factors and information concerning price factors to be used at times by International and other respondents in calculating, determining and announcing their offers to sell dry white lead?

A. No, I do not.

Q. In my last question, I referred to respondents, and by that I included all the respondents previously mentioned. Does that change the answer to the question?

A. No.

Q. Do you know if International ever agreed to adopt or adopted, maintained and used terms and conditions of sale employed in so-called consignment or agency agreements under the leadership of respondent National Lead Company for the purpose of preventing dealers from selling dry white lead and from making offers to sell such products at levels lower than the offers made by respective

respondent producers whose names were affixed to such consignment or agency agreements?

A. No, I do not.

Q. Do you know if International ever agreed with the other respondents previously named or with any one of them to fix or fixed and included in offers to sell, the prices,
3510 terms and conditions at which said lead pigments were sold or offered for sale in commerce?

A. No, I do not.

Q. When did International first commence the production of white lead in oil?

A. During the latter part of 1936.

Q. Where was this material produced?

A. At East Chicago, Indiana.

Q. Had it previously been manufactured at that plant?

A. Yes.

Q. By what company?

A. By the Anaconda Lead Products Company.

Q. When did Anaconda Lead Products Company first produce white lead in oil, if you know?

A. In the first part of 1931.

Q. You have previously testified that the Anaconda Lead Products Company went out of the business of manufacturing dry white lead upon its dissolution in 1936, and the acquisition by International of its assets and properties.

Did the Anaconda Lead Products Company continue to produce white lead in oil up to the time of its dissolution?

A. Yes.

Q. Were these activities taken over and carried on by the respondent International at that time?

A. Yes.

3511 Q. Will you describe the Anaconda Lead Products Company's first methods to sell white lead in oil and the pricing methods that were employed?

A. Well in the beginning we knew practically nothing about the white lead in oil market. At first we thought we would confine our activities to selling white lead in oil to industrial accounts. We sent out at least one man to survey industrial accounts, and found out that the consumption of white lead in oil by such accounts was practically negligible.

Consequently, we began to promote the sale of white lead in oil in certain sections of the country through dis-

tributors who were given a defined territory. In other areas, we contacted the dealer trade direct.

In the beginning we did not have any regular pricing system, and we left it pretty much up to the salesmen to get the most that they could for our unknown product.

Q. At the time the Anaconda Lead Products Company went into the white lead in oil business, what was your position so far as sale of this product was concerned?

A. I was district salesmanager in the midwestern area.

Q. District salesmanager of what?

A. Of dry white lead, white lead in oil, and zinc oxide.

Q. Did I understand you to say that initially your sales were limited to the Midwest area, of white lead in oil?

A. Our sales were not limited to that area, no.

3512 Q. Were you in charge of these preliminary activities when the Anaconda Lead Products Company was first starting to sell white lead in oil?

A. When I was district salesmanager in the Midwest area, I really, from the beginning, devices the promotional methods for selling white lead in oil in all territories.

Q. And you were intimately familiar with the Anaconda Lead Products' sales problems so far as the sale of white lead in oil was concerned?

A. I would say that I spearheaded the thing.

Q. For that company?

A. Yes.

Q. Now, you previously testified as to the sales practices or methods when this material was first manufactured. Were these pricing methods subsequently changed?

A. Yes, they were.

Q. What price policy was subsequently adopted by the Anaconda Lead Products Company?

A. For sales to the dealers, we established a price for our white lead in oil that was one-quarter of a cent per pound under the price for the National Lead Company's agents.

Q. Were there any other changes made in your pricing methods at about that time?

A. I believe at about that time we began to sell white lead in oil on a zone basis.

3513 Q. What was the reason that prompted you to decide to sell white lead in oil at a quarter cent under the price charged by National Lead for a similar commodity?

A. Well we could not expect to get the same price for our comparatively unknown product that the National Lead Company got for their product which had been very well advertised for many years. The business from the beginning was not too profitable, and consequently we felt we could not get very far under the National Lead Company price, and so we adopted a method of selling at a quarter of a cent under the National Lead Company's price, that additional quarter of a cent per pound being considered by us as additional compensation for the dealer for promoting the sale of our unknown product.

Trial Examiner Norwood: When was that? After International took over?

The Witness: No, that was before International took over.

Trial Examiner Norwood: About when was it?

The Witness: I don't recall when it was, but I believe it probably was about 1933.

By Mr. Gardiner:

Q. You have testified you adopted a practice of underselling National's Lead price of a quarter cent per pound. How did you determine what National Lead's price was?

A. It was very easy for us to find out the National
3514 Lead Company's price by contacting our customers and prospective customers.

Q. How did you get information from your customers? How did they know? Who were your customers?

A. Well, our customers to a limited extent were distributors in certain areas, but generally they were dealers.

Q. Were they also dealers of competing products?

A. The class of trade we termed dealers were both what National called their selling agents and the dealers that purchased from the National Lead Company's selling agencies.

Q. Did National Lead sell its white lead in oil by any particular trade name?

A. Dutch Boy.

Q. Was there any resistance in the trade to a low priced white lead in oil?

A. When we began to market white lead in oil, and in fact for a considerable period after that, there were some substitute products on the market. The substitute products would have a name that would be similar to the Dutch Boy

name, and the containers were sometimes an imitation of the Dutch Boy containers. Any white lead in oil would be sold at a very low price would be viewed with suspision and probably would be considered a substitute of inferior quality.

Q. Could you have sold white lead in oil produced by Anaconda Lead Products Company, and subsequently
3515 by International, at a price equal to National Lead's?

A. No, I don't think we could.

Q. Could you have sold the material at a price lower than a quarter of a cent a pound below National Lead's price?

A. If we had, we would run into the danger of having it considered a substitute of inferior quality.

Mr. Gardiner: May we have a recess, Mr. Examiner?

Trial Examiner Norwood: We will take a five minute recess.

(A short recess was taken.)

Trial Examiner Norwood: Go ahead.

By Mr. Gardiner:

Q. Did Anaconda Lead Products sell white lead in oil on a zone basis?

A. Yes.

Q. When did International first adopt the policy of selling on a zone basis?

A. During the latter part of 1936.

Q. Was that at the time that International went into the white lead in oil business?

A. That was at the time that International took over the assets and properties of the Anaconda Lead Products Company.

Q. Why was a zone system adopted by these companies as a means of selling white lead in oil?

A. We adopted it because it seemed to be the com-
3516 petitive practice.

Q. Would you describe generally what this zone system was?

A. Well, the country was divided in certain areas called zones. There was a par zone, one-eighth, one quarter, three-eighths, one-half, three-quarters and one cent. The zones in which there were higher differentials took higher freight rates.

Q. You just described the par zones as consisting of certain fractions, and then you said one cent. Do those previous fractions refer to fractions of one cent?

A. Those fractions that I mentioned are fractions of one cent over the par zone price, with the exception of the last one I mentioned, which was a full cent over the par zone price.

Q. You made some reference to freight. Do I understand that freight was charged in addition to these prices?

A. No.

Q. What was the situation on freight?

A. What I mentioned was that the zones other than the par zone, for which differentials were charged, usually carried a higher freight rate.

Q. That is all white lead in oil was sold f. o. b. East Chicago, freight allowed?

A. That is correct.

Q. And these price differentials related to the 3517 zones in which the material was delivered?

A. That is right.

Q. How did you determine what your competitor's practice was as to the zone system for the sale of this material?

A. We contacted customers and prospective customers to find out what our competitors were doing in this respect.

Q. Was any record made of what you determined as to what their practice was?

A. Well, I believe that occasionally our salesmen would put information to that effect in their sales reports. They may have dropped us letters to tell us what was going on price-wise by our competitors.

Mr. Wright: I object, Your Honor, and move that that answer be stricken. It was based on belief rather than the witness' knowledge. He stated that the salesmen may have reported these things. It is obviously not a matter within his own knowledge from his answer.

Trial Examiner Norwood: Did they usually report that kind of information?

The Witness: It was customary for our salesmen to write out a report on every call that they made on a customer or prospective customer, and in these reports they would put any information they picked up that they thought would be of interest to me as salesmanager regarding the activities of our competitors.

3518 Trial Examiner Norwood: Do you know that that information came to you in that way?

The Witness: Yes, I do.

Trial Examiner Norwood: Objection overruled.

By Mr. Gardiner:

Q. Did you keep a map outlining these zone systems?

A. Yes.

Q. Was this map prepared at the suggestion or request or instigation of the representatives of any of the respondents heretofore named in this case?

A. No.

Q. Did you ever discuss with any representatives or official of any of the respondents heretofore named in this proceeding the use of such a map as the price pattern or the use of such a map in the sale of white lead in oil?

A. No, I did not.

Mr. Gardiner: I ask that this be marked Respondent's Exhibit for Identification No. 193.

(The document referred to was marked Respondent's Exhibit No. 193 for identification.)

By Mr. Gardiner:

Q. I show you Respondent's Exhibit for Identification 193 and ask you if you have seen this document before?

A. Yes, I have seen these figures before.

Q. Do you know anything about their preparation?

3519 A. They were prepared under my supervision.

Q. Who requested that you have these figures prepared?

A. Our legal counsel.

Q. What was the basis on which these figures were calculated?

A. The figures showing the total production of white lead in oil in the United States for the years listed were taken from figures supplied by the Lead Industries Association.

The figures showing the production of white lead in oil by International for the years listed were taken from the records in our accounting department at East Chicago, Indiana.

Mr. Gardiner: I should like to offer at this time in evidence Respondent's Exhibit No. 193, subject to the same qualifications as the previous exhibits have been submitted.

Mr. Wright: Subject to that qualification, I have no objection.

Trial Examiner Norwood: It is so received.

(The document referred to, heretofore marked for identification RESPONDENT'S EXHIBIT 193, was received in evidence.)

Mr. Gardiner: I ask that this be marked Respondent's Exhibit No. 194 for identification.

(The document referred to was marked Respondent's Exhibit 194 for identification.)

3520 By Mr. Gardiner:

Q. I show you Respondent's Exhibit No. 194 for Identification and ask if you have seen this document before?

A. Yes, I have seen these figures before.

Q. What do you know about their preparation?

A. The figures showing the sale of white lead in oil for the years listed were supplied by the Lead Industries Association.

The figures showing the sales of white lead in oil by International for the years listed were taken from the records in our sales department at East Chicago, Indiana.

Q. Were you requested to prepare these figures?

A. Yes, I was.

Q. By whom?

A. By our legal counsel.

Q. What was the basis on which these figures were calculated?

A. (No response.)

Q. Did I ask you that?

A. Yes.

Q. I say, from what sources were these figures taken?

A. The figures showing the sale of lead in oil, total sales, that is, in the United States for the years listed were taken from figures supplied by the Lead Industries Association.

Those figures showing the sale of white lead in oil

3521 by International for the years listed were taken from the records in our sales department at East Chicago, Indiana.

Mr. Gardiner: I should like to offer into evidence at this time Respondent's Exhibit marked for identification No. 194 subject to the same qualifications as the previous exhibits have been accepted.

Mr. Wright: I have no objection to its being received subject to those qualifications.

Trial Examiner Norwood: It is so received.

(The document referred to, heretofore marked for identification RESPONDENT'S EXHIBIT No. 194, was received in evidence.)

By Mr. Gardiner:

Q. In what manner was white lead in oil sold? That is, how was it packaged?

A. In metal containers.

Q. What were the sizes of these containers?

A. 100 pounds, 50, 20, 12 and ½, 5, and 1.

Q. Did these containers carry a different price?

A. Yes.

Mr. Gardiner: I ask that this document be marked for identification Respondent's Exhibit 195.

(The document referred to was marked Respondent's Exhbit 195 for identification.)

By Mr. Gardiner:

3522 I show you Respondent's Exhibit marked No. 195 for identification and ask you if you have seen that before?

A. Yes, I have seen these figures before.

Q. Do you know anything about this document's preparation?

A. It was prepared under my supervision.

Q. What was the basis upon which these figures were calculated?

A. The price per 100 pound keg was taken from our regular price schedule which was in effect as of the date. The average freight per 100 pounds was arrived at by taking the total freight costs for the period and dividing it by the number of pounds shipped during that period. The net was the mill net. The decrease in net over East Chicago shows the decrease in mill net.

Trial Examiner Norwood: Does this relate entirely to white lead in oil?

Mr. Gardiner: Yes, Your Honor, this relates to white lead in oil.

By Mr. Gardiner:

Q. At whose request did you prepare this document?

A. At the request of our legal counsel.

Q. Why was the year 1942 selected?

A. As I recall it, that was what the sales department, or rather I as salesmanager, considered the last nearly normal year prior to the end of the last war.

3523 Mr. Gardiner: I should like to submit at this time in evidence Respondent's Exhibit marked for identification purposes No. 195, subject to the same qualifications as obtained with regard to the previously submitted exhibits.

Mr. Wright: Your Honor, this is a piece of made evidence, in that it was prepared at the request of counsel by this witness for the purpose of being offered in this matter. It purports to show that the price differences made between the par zone and the other zones, apparently, during the year 1942, were more than offset by the freight costs that were involved in these shipments. In other words, this does to the heart of the issue.

It has been improperly identified to make it admissible at this point, because we do not know what records were used in making this; nor do we know the means by which the records were processed to arrive at these averages.

There has been no basis shown here to the effect that the means of working it out and making this piece of artificial evidence which is thought to be admissible are reliable, or the nature in which it could be admitted as evidence of the facts which it purports to show.

Now, this cannot exist outside of the original records. So I must strenuously object to its admission. And I also would object to its being admitted subject to submission of documents later to me, because I think it is a highly 3524 improper method of handling this matter to put the burden on Commission's counsel of going through all records of this company for the year 1942 to ascertain how this thing was prepared and whether the records, which, after all, are the evidence, have been accurately reflected in this piece of evidence.

Mr. Gardiner: If your Honor please, so far as making evidence is concerned, it is true, as brought out on direct examination, that this was prepared at the request of counsel for the respondent. These figures were prepared from records which were or are available, or can be made available. They are not available here at this present time. They represent averages which were arrived at, accord-

ing to the witness who can elaborate as to the detail which was used in their preparation.

There is no question but what this represents a summary, and that should be the value in it showing in a simple manner the difference between the net realized in these various zones with relation to the zone price, and I submitted it subject to the same qualifications as these others were submitted, which was that complete records should be submitted to counsel for check.

Mr. Wright: I submit that this witness has not testified that these things were made up from any record which would be admissible in this case. He said we took
3525 average freight costs. Now, what did he take average freight costs from? We have no idea.

Trial Examiner Norwood: Where did you get these freight costs?

The Witness: We took the freight charges for each zone for the period specified from the records in our accounting department and divided that by the pounds—

Trial Examiner Norwood: Was that the actual freight charges on the shipments actually made?

The Witness: Yes, sir.

Trial Examiner Norwood: There wasn't any average for a zone, was there?

The Witness: It was an average for a zone inasmuch as we divided the total freight charges actually paid for that period by the total number of pounds shipped into that zone during that period.

Mr. Wright: Your Honor, if we are going to get into the question of further identification of this, I would like the right of preliminary cross-examination.

Trial Examiner Norwood: Yes, go right ahead.

Mr. Wright: Certainly on the basis of the record as it is, this thing is inadmissible, because the records of the accounting department do not make something admissible unless it is the type of record which is sufficiently reliable that it could be admitted in evidence here.

3526 Trial Examiner Norwood: Go ahead.

Mr. Wright: Mr. Hurless, does this purport to cover the sales for the entire year of 1942?

The Witness: Yes, it does.

Mr. Wright: How did you determine the proportion of your sales which fell within the par zone and the various differential zones?

The Witness: We determined that by determination of the shipments.

Mr. Wright: Now, just what mechanical process did you go through, what records did you consult, and what means did you use?

The Witness: I had the records for the year 1942—

Mr. Wright: What records were they?

The Witness: The records of the shipments that were kept in our accounting department.

Mr. Wright: Were they invoices?

The Witness: This information was taken from invoices and freight bills.

Mr. Wright: You mean this document here was made up directly from invoices?

The Witness: And freight bills.

Mr. Wright: And original freight bills?

The Witness: Or copies of the original freight bills. I don't know that we retained the original freight 3527 bill.

Trial Examiner Norwood: It represents the average of the freight actually paid, does it?

The Witness: That is right.

Mr. Wright: Now, I notice you have included in the top here "East Chicago" with a net of 10.50 on your first line there. You did not take into account the local cartage that might have been involved in deliveries there?

The Witness: Well, any deliveries to customers within the city limits of East Chicago would not necessarily be shipped by public carrier. Such deliveries would very likely be made by our own truck.

Mr. Wright: By your own truck, but at your expense in either event?

The Witness: Yes.

Mr. Wright: So that your net correspondingly would be reduced by the cost of that cartage?

The Witness: That is right.

Mr. Wright: Do you know what that cost might be in 1942 on an average basis?

The Witness: No, I don't.

Mr. Wright: As I understand it from Exhibit 194, your sales of white lead in oil during 1942 amounted to 1,813.9 tons?

The Witness: That is correct.

3528 Mr. Wright: You had the original invoices for that entire 1,813.9 tons?

The Witness: We had copies of the originals.

Mr. Wright: Or copies of the originals, and you segregated them all by the geographical zones?

The Witness: That is correct.

Mr. Wright: Does it appear on the invoice as to what zone the shipment was to?

The Witness: No, it did not appear on the invoices, marked, for example, one-eighth zone or one-quarter zone, but that could be determined by the price.

Mr. Wright: Now, did all of these invoices include just 100 pound containers?

The Witness: No. In exhibit 195 we gave the price per 100 pound keg to indicate the base price to the par and other zones, but the total shipment would be made up of the total amount of lead in oil shipped, which would be in 100 pound containers, and containers of other sizes.

Mr. Wright: In other words, these invoices from which you made it up might not have had 100 pound kegs? It might have had 12-½ pound cans, or 5 pound cans, or 1 pound cans?

The Witness: That is right.

Mr. Wright: So that your net in this column here was not derived from those invoices in any way. Your net
3529 just shows what would have been the case had this invoice been for hundred pound containers?

The Witness: Will you repeat that question, please?

Mr. Wright: The column under "net" in this exhibit that we are talking about now shows the net which would have applied had that shipment been in hundred pound kegs?

The Witness: Yes.

Mr. Wright: But it might not have been in one hundred pound kegs?

The Witness: That is correct.

Mr. Wright: Well, now, did you separate these invoices by geographical location?

The Witness: Yes.

Mr. Wright: Who did that, what employees did that?

The Witness: A clerk in our accounting department who handled the accounting matters in connection with the white lead in oil sales.

Mr. Wright: Now, how did you keep your freight

records from which you got this average 100 pound freight rate?

The Witness: Well, as I remember it, we had a large ledger in which we entered the complete data from the freight bill, and then a copy of the freight bill was filed in the accounting department at East Chicago, Indiana.

3530 Mr. Wright: Now, from what did you get these figures? Was it from the ledger or from the freight bill?

The Witness: I don't know whether they came from the ledger or from the freight bill.

Mr. Wright: Would those freight bills be keyed to the invoices which showed shipments?

The Witness: We could locate the freight bill that would cover the freight charges for each invoice.

Mr. Wright: Could you tell the invoice that was involved from the freight bill or from the entry in the ledger?

The Witness: Yes, we could do that without any trouble.

Mr. Wright: Well, was that done in preparing this?

The Witness: It is my understanding that it was.

Mr. Wright: Do you know yourself that it was?

The Witness: Well, I did not do it myself, but the instructions were to carry out the work along that line.

Mr. Wright: Well, just what were your instructions? Can you recall exactly how you instructed the employees to make this up?

The Witness: I don't know that I can recall exactly, but in general the instructions were to determine the amount of lead in oil for this period that was shipped to each zone, and to determine the average freight cost

3531 by dividing the cost of the freight by the pounds of lead in oil shipped.

Mr. Wright: You did not tell them just how you wanted that done, but just told them to do it. Is that correct?

The Witness: That is correct. I assumed that they would go to the proper records and make the proper entries from them.

Mr. Wright: Do you know whether or not all of these records are still preserved in the form of invoices or copies of invoices and freight bills?

The Witness: When we closed our plant during 1946, it is my understanding that such records were shipped to Perth Amboy, New Jersey, for storage.

Mr. Wright: Are you able to state whether they are in existence at this time and can be made available?

The Witness: I cannot definitely state that, because I had nothing to do with the packing and shipping of the records.

Mr. Wright: Your Honor, I want to renew my objection now on two additional grounds: One, that this gentleman is not acquainted with the details in which these figures were compiled, but turned the job over to subordinates, and this can only be properly identified by the people who actually did the work, since he only assigned the task in a general way; and for the additional reason that the
3532 basic data may no longer be available. According to this witness, he cannot state whether it is or whether it is not.

Mr. Gardiner: If your Honor please, this was submitted with the same qualifications as these previous exhibits, which was, as I understand Your Honor's ruling, that they would be stricken—

Trial Examiner Norwood: I will sustain the objection for the time being until it appears that it is possible for the basic data to be made available. Inasmuch as those are invoices, and just one year's invoices, that would not be a very large book. I should think counsel could bring those in.

Mr. Wright: It covers almost 2,000 tons of this material.

Trial Examiner Norwood: Well, tons—you could put many tons on one little invoice, you know.

Mr. Wright: Furthermore, there has been no direct evidence on the part of the respondent, who has the burden of supporting this document, showing the technique and means by which it was made up. This witness does not know what records were used to make any of this up, the freight record.

Trial Examiner Norwood: That point is well taken also, but it should appear here that there are basic data which can be produced, and also that somebody who brings them can explain the thing to us. It is not in satisfactory
3533 condition now, anyway, but counsel may present that again when he meets those objections. I will sustain the objection for the time being. That is exhibit 195, is it?

Mr. Wright: Yes.

By Mr. Gardiner:

Q. Was white lead in oil ever sold by Anaconda Lead Products or International on consignment contract?

A. No.

Q. Were there any exceptions to this practice?

A. One.

Q. What was that exception?

A. The State of Wisconsin.

Q. Why was consignment contract used in the State of Wisconsin?

A. It is my understanding that the consignment contract was used in the State of Wisconsin because the laws of the State of Wisconsin provide that in case of insolvency, a consigned stock cannot be returned to the consignor unless there is a written agreement to cover it.

Mr. Wright: I move the answer be stricken. It concerns the witness' understanding. He is not competent to testify as to the reason for the company policy on the basis of knowledge that they may be required from others. It is hearsay.

Trial Examiner Norwood: He can give us his reason.

3534 Did you establish that policy or fail to establish it? Is it within your province to determine that policy?

The Witness: That policy was determined by our legal counsel.

Mr. Wright: He testified only to his understanding, Your Honor. I think a re-examination of the answer would show that he did not state of his own knowledge.

Trial Examiner Norwood: That would be all right, his understanding, if he made the policy. He can tell us the considerations.

But I think probably your objection should be sustained.

By Mr. Gardiner:

Q. Were you ever instructed to prepare consignment contracts for the use of sale of materials in Wisconsin?

A. Yes.

Q. Were you ever instructed to prepare consignment contracts for the sale of white lead in oil in any other States?

A. No.

Q. At the time you received these instructions, were you told the reason why you were required to prepare consignment contracts for Wisconsin?

A. Yes.

Q. What was the reason?

A. The reason was the laws of the State of Wis-
3535 consin provide that in case of insolvency, the consigned stock cannot be returned to the consignor unless there is a written agreement to cover it.

Q. Did either Anaconda Lead Products or International ever use any type of consignment arrangement in other States for the sale of white lead in oil?

A. They used the consignment arrangement.

Q. When was that arrangement first used, and describe its operation.

A. I cannot give the date when it was first used, but I believe that it probably was about 1932.

An order for shipment on consignment would be taken by our salesmen and forwarded to the main office at East Chicago, or would be sent indirect to that office by the customer. The shipment would be made and invoiced on memo billing.

About the 20th or 25th of every month we would send a form to the customer to be filled out. On it the customer would insert the amount of consigned stock on hand on the 25th or the preceding month, the amount of lead in oil received since that date, and the amount on hand on the present date, the difference being the amount that had been sold from the consigned stock.

Then the customer would be invoiced for that amount at current prices.

Q. Do you know who devised that procedure, or
3536 method of sale?

A. I mainly devised it, with the assistance of members of our sales department and accounting department.

Q. Was the arrangement you have just descibed put into effect at the instigation of, or through the agreement with, any of the respondents heretofore named, with any one or with an official representative of any one of these respondents?

A. No.

Q. How much business did the Anaconda Lead Products and International do by means of this consignment arrangement in the sale of white lead in oil?

A. Generally, the sales from consigned stocks accounts for 50 to 60 percent of our total sales of white lead in oil.

Q. Did Anaconda Lead Products or International ever

supply dealers with price cards showing retail prices for white lead in oil?

A. Yes.

Q. Why were these cards given to dealers?

A. Those cards were informative and contained advertising value for us.

Q. Did Anaconda Lead Products or International ever require dealers to resell white lead in oil at these prices listed on such cards?

A. No.

Q. Did Anaconda Lead Products or International
3537 ever have any arrangements with dealers with respect to the terms and conditions of resale or the prices of materials resold?

A. Will you repeat that question, please?

Q. Did Anaconda Lead Products or International ever have any arrangements or any agreements with dealers with respect to the terms and conditions of the resale or the prices of the materials as such to be resold?

A. No.

Q. Did International, in selling and offering to sell dry white lead and lead in oil in commerce to agents or dealers for resale, require its customers to resell such products at prices and terms of sale fixed and determined and published by it?

A. No.

Q. Will you state again how many years you have been connected with the International Smelting & Refining Company?

A. 25 years.

Q. What relationship does that company have with respondent Anaconda Copper Mining Company?

A. It is a subsidiary.

Q. Are you familiar generally with the operations of the International Smelting & Refining Company throughout the United States?

A. I believe that I am.

Q. Are you familiar generally with the operations
3538 of the Anaconda Copper Mining Company throughout the United States?

A. I believe so.

Q. Do you know whether the Anaconda Copper Mining Company has ever engaged in the production and sale of lead pigments?

A. It has not.

Q. Do you know whether the Anaconda Copper Mining Company ever gave any directions through its officers or agents to the Anaconda Lead Products Company or to the International Smelting & Refining Company as to the operations of those companies or to the prices to be charged for lead pigments and the terms or conditions under which they were to be sold?

A. No, I do not.

Q. Do you know if the Anaconda Copper Mining Company ever exercised any control over Anaconda Lead Products or International beyond that which a stockholder would ordinarily be expected to exert?

A. No, I do not.

Q. In advertising their products, did Anaconda Lead Products and International use a common name and trade-mark?

A. Yes.

Q. What was it?

A. It was the Anaconda trade-mark.

Q. Do you know if there was any arrangement with the Anaconda Copper Mining Company for such use?

A. I do not know of it.

3539 Q. Why was that particular trade-mark used?

A. Well, we used it to help us to sell our white lead in oil, which was a comparatively unknown product at that time.

Q. Do you know of any agreement on the part of International with the National Lead Company, the Eagle-Picher Lead Company, the Eagle-Picher Sales Company, the Sherwin-Williams Company, or the Glidden Company for the adoption and maintenance of a system of delivered price quotations for white lead in oil?

A. No, I do not.

Q. Do you know of any agreement between International and any of the other respondents in this proceeding heretofore named for the adoption and maintenance of a plan whereby the United States is divided into zones for the purpose of selling white lead in oil?

A. No, I do not.

Q. Do you know of any arrangement whereby International sought and secured advice, assistance and cooperation of the Lead Industries Association, its officers, employees and agents, along with the other respondents

heretofore mentioned, or any one of them, in fixing, adopting, publishing and using non-competitive terms and conditions of sale in connection with the sales and offers to sell of white lead in oil?

A. No, I do not.

Q. Do you know if International ever used the
3540 office of the Lead Industries Association with the cooperation of the officials of the same for the purpose of exchanging price factors and information concerning price factors to be used at times by the International and the other respondents heretofore named or any one of them in calculating, determining and announcing their offers to sell white lead in oil?

A. No, I do not.

Q. Do you know if International ever agreed to adopt or adopted, maintained and used terms and conditions of sale embodied in the so-called consignment or agency agreements under the leadership of respondent, National Lead Company, for the purpose of preventing dealers from selling white lead in oil and from making offers to sell such products at levels lower than the offers made by the respective respondent producers heretofore named, whose names were affixed to such consignment or agency agreements?

A. No, I do not.

Mr. Wright: Your Honor I am willing to stipulate that this witness will testify that he does not know of any violation of this complaint, if it will save time.

Trial Examiner Norwood: Off the record.

(There was a discussion off the record.)

Trial Examiner Norwood: On the record. Objection overruled.

By Mr. Gardiner:-

3541 Q. Mr. Hurless, you have previously been asked a series of questions about your knowledge of the existence of agreements between International and the other respondents in this case covering the sale and distribution of dry white lead. I have also asked you some of the same questions with relation to white lead in oil.

Is your answer the same as to those questions which you have previously been asked as to dry white lead—

Mr. Wright: You mean, with regard to agreements?

By Mr. Gardiner:

Q. With regard to agreements which have not been asked you with regard to white lead in oil?

A. The answer would be the same.

Mr. Gardiner: Off the record.

Trial Examiner Norwood: Off the record.

(There was a discussion off the record.)

Trial Examiner Norwood: On the record.

By Mr. Gardiner:

Q. Is the respondent International now engaged in either the production or sale of any of the lead pigments heretofore described as included within the definition of the amended complaint?

A. No.

Q. When did International stop the production of dry white lead and lead in oil?

3542 A. Is the question, when did they stop?

Q. When did International stop the production of dry white lead and lead in oil?

A. In July of 1946.

Q. When did International make the last sale of those materials?

A. August, 1946.

Q. Does International have on hand at the present time any of such products?

A. No.

Q. What use is being made of the plant where these products were previously manufactured?

A. The plant where these products were previously manufactured was sold to the Eagle Picher Company of Cincinnati, and it is my understanding that they are using a part of it for the manufacture of dry white lead and white lead in oil.

Q. When was this property sold to the Eagle Picher Company?

A. On October 1, 1946.

3543 Q. When was the first public announcement made that International was going out of the white lead and oil business?

A. On June 20, 1946.

Q. What was the nature of this announcement?

A. Substantially the same as the one for dry white lead.

Q. Are the personnel who were engaged in the pro-

duction and sale of these lead pigments still in the employ of International?

A. Only two.

Q. Who are they?

A. My secretary, Miss Helen Ohr, and myself.

Q. Are you familiar generally with the operations of the International Smelting & Refining Company and the Anaconda Copper Mining Company in the United States?

A. Yes, generally.

Q. Do you know of any facilities of the properties in this country or any other country that could be readily converted to production of dry white lead or white lead in oil?

A. I would say that there are no such properties.

Q. Would it be a correct statement to say that to go back into dry white lead or white lead in oil business, it would be necessary to purchase or construct a plant for that purpose?

A. Yes.

Q. Do you know if International has any intention 3544 of resuming the production of these lead pigments?

A. I believe that they have no intention whatsoever.

Mr. Wright: I move that that answer be stricken, Your Honor. This witness is obviously in no position to know the intention of the board of directors and governing officers of the corporation.

Trial Examiner Norwood: Motion allowed.

By Mr. Gardiner:

Q. In view of your familiarity with the Anaconda Copper Mining Company's operations, do you know of any plan that it has to enter the production of these materials through any of its susidiaries?

A. I know of no such plans.

Q. Can you elaborate on the reasons why International decided to go out of the lead pigment business?

A. Well, the reasons they decided to go out of the lead pigment business are briefly indicated in the letter of announcement that was sent to the trade on June 1, 1946.

Q. Was international influenced in its decision in any way by the action of its competitors?

A. No.

Q. With relation to the time that the decision was made

to discontinue these operations, do you know when it was decided to sell the plant?

A. I believe it was about four to six weeks afterwards.

3545 Q. That is, it was four to six weeks after the decision was made to discontinue the operations that it was decided to sell the plant?

A. Well, I would put it this way: I heard about the decision to discontinue the operations about the middle of May, 1946, and about four to six weeks after that we began to make efforts to sell the plant.

Q. Were there other parties interested in its purchase besides the Eagle-Picher Company?

A. Yes.

Q. Do you know what the names of any of these prospective purchasers were?

A. The Metal and Thermit Company of East Chicago, Indiana; the American Zinc, Lead & Smelting Company of St. Louis, Missouri; and the Calumet Iron & Supply Company of East Chicago, Indiana. Those were the principal ones.

Mr. Gardiner: Your Witness.

Mr. Wright: I suggest that counsel has finished his direct examination that we recess for lunch.

Trial Examiner Norwood: Is counsel through now?

Mr. Gardiner: I am through with this witness, Your Honor.

Trial Examiner Norwood: What is your pleasure, gentlemen?

Mr. Wright: Two o'clock.

3546 Trial Examiner Norwood: We will recess until 2 o'clock.

(Whereupon, at 12:10 p. m., a recess was taken until 2 p. m., this day.)

3547 Afternoon Session

2:00 p. m.

Trial Examiner Norwood: The hearing will come to order.

Mr. Hurless will resume the stand.

FRANK H. HURLESS resumed the stand and testified further as follows:

Trial Examiner Norwood: Proceed with the cross-examination.

Cross-Examination by Mr. Wright.

Q. Mr. Hurless, will you state again your employment with the International Smelting & Refining Company, beginning back in the beginning?

A. I was employed by the International Smelting & Refining Company in 1922 as a checker on the construction of a zinc oxide plant at Akron, Ohio. I checked the materials and supplies and the amount of labor used in that construction since the construction was on a cost-plus basis.

Subsequently I had charge of the small plant office at Akron, Ohio.

Q. That is still International Smelting Company?

A. That is right.

3548 About 1927 I began part-time sales work and about 1929 I began full-time sales work and was transferred to the main office at East Chicago, Indiana.

Q. That is, sales work for International Smelting?

A. That is right.

In 1930 I was made district salesmanager. I was in the Midwest area and had charge of the sale of dry white lead and zinc oxide in the Midwestern area.

In 1936, I was made assistant salesmanager and had charge of the sale of dry white lead, white lead in oil, and zinc oxide. While assistant salesmanager, I actually had charge of the sales, since our official salesmanager in Akron, Ohio, had other duties that did not permit him to give full time to sales work.

In 1938, I was made salesmanager in full charge of the sale of dry white lead, white lead in oil and zinc oxide in all territories.

Q. What was your position when the International Smelting & Refining Company left the business of marketing these lead pigments? Were you still salesmanager at that time?

A. Yes, sir.

Q. What is your present position with the International Smelting Company?

A. I am a special representative for the International Smelting & Refining Company in the Midwestern area.

3549 Q. That is, sales representative?

A. No, not a sales representative; a sort of general representative.

Q. Who is the president of International Smelting & Refining Company?

A. It is my understanding that Mr. C. F. Kelly is president of International Smelting & Refining Company.

Q. Was he president of it back in 1936, do you recall?

A. I do not know.

Q. What office does Mr. Kelly hold in the Anaconda Copper Mining Company?

A. I understand that he is chairman of the board.

Q. Is Mr. Kelly also a director of International Smelting & Refining Company?

A. I believe that he is.

Q. Who are the other directors of International Smelting & Refining Company?

A. I believe that Mr. Frederick Laist is.

Q. That is L-a-i-s-t?

A. Yes. And Mr. E. O. Sowerwine is a director, I believe.

Q. Who are the other directors, do you recall?

A. I do not know who they are.

Q. Is Mr. Laist or Mr. Sowerwine connected with the Anaconda Copper Mining Company in any way?

3550 A. I believe Mr. Laist is the vice-president of the Anaconda Copper Mining Company.

Q. Does he have any official position with International Smelting aside from being a director?

A. I believe he is vice-president of International Smelting & Refining Company.

Q. What is Mr. Sowerwine's position with International beyond that, for the record?

A. I am not sure, but I think he is secretary-treasurer.

Q. You mean, you have difficulty in knowing who the officers of this corporation are?

A. Yes, sir, I do.

Q. What is his position with Anaconda Copper Mining Company?

A. Mr. Sowerwine is the vice-president, I believe.

Q. How many members of the Board of Directors are there of International Smelting & Refining Company?

A. I do not know.

Q. Do you know whether those members of the Board of Directors are also members of the Board of Directors or officers of the Anaconda Copper Mining Company?

A. I believe that Mr. Kelly is a director of both, but as regards the others, I do not know.

Q. And those three are the only ones that you can recall who are members of the board?

A. Those that I believe are members of the board.

3551 Q. Of International Smelting & Refining Company?

A. Yes.

Q. What other corporate officers are there besides those three men? Of International, I am speaking now.

A. Well, let us see. We have touched on the president, vice-president, and—

Q. Secretary-treasurer?

A. Secretary-treasurer.

I do not know that there are any other officers.

Q. Have you ever attended a meeting of the Board of Directors of the International Smelting & Refining Company?

A. No, sir.

Q. Do you recall ever receiving instructions from the Board of Directors of the International Smelting & Refining?

A. No, sir.

Q. Have you ever heard of a meeting of the Board of Directors of International Smelting & Refining Company, as such?

A. I cannot recall that I have.

Q. Who is the president of the Anaconda Sales Company?

A. I believe that Mr. C. F. Kelly is president.

Q. Is Mr. Laist an officer and director of the Anaconda Sales Company?

A. I don't believe that he is.

Q. Who are the other officers and directors of the Anaconda Sales Company?

3552 A. I believe that Mr. Clarence Glass is vice-president.

Q. What is Mr. Glass' connection with Anaconda?

A. Well, so far as I know his only connection is that he is vice-president of the Anaconda Sales Company.

Q. He has no independent office or no other office in the Anaconda Copper Mining Company?

A. Not that I know of.

Q. Who are the other officers of the Anaconda Sales Company?

A. Mr. Kennedy is vice-president of the Anaconda Sales Company.

Q. What is Mr. Kennedy's full name?

A. I don't know.

Q. What did you say his office was?

A. Vice-president of the Anaconda Sales Company.

Q. And Mr. Kelly, Mr. Glass and Mr. Kennedy are the three officers you know of in the Anaconda Sales Company?

A. Mr. Dohrman, I believe, is either secretary or secretary-treasurer.

Q. Do either Mr. Dohrman or Mr. Kennedy have any connection that you know of with the Anaconda Copper Mining Company?

A. I don't know of any such connection.

Q. As far as you know, they devote their full time to the operations of the Anaconda Sales Company?

A. That is my understanding.

Q. When did the International Smelting & Refin-
3553 ing Company first engage in the production of lead pigments?

A. In the latter part of 1936.

Q. So that at the time you say you had to do with the sales of dry white lead, from the period 1930 to 1936, that company was not engaged in the production or sale of white lead. Is that correct?

A. No.

Q. What was the arrangement? I withdraw that question.

As I understand it, during that period from 1930 to '36, the production was by Anaconda Lead Products, and the sales were by Anaconda Lead Products and Anaconda Sales Company. Is that correct?

A. That is right.

Q. Well, how did you, as an employee of International

Smelting & Refining Company, have charge of those sales at that time?

A. Well, in my capacity—for example in 1930 I was district salesmanager—I simply sold the products that were produced by the Anaconda Lead Products Company.

Q. Well, were you acting for Anaconda Sales Company, Anaconda Lead Products Company, or International Smelting & Refining Company, or could you tell where one began and the other left off?

A. They were pretty much overlapping.

Q. Did they have common officers and common em-
3554 ployees during that period of time?

A. Well, the main office of the Aanaconda Sales Company at that time was in New York City. We had our main sales office at East Chicago, Indiana, from which point I operated.

Q. Were employees of Anaconda Sales Company operating that office too, or were they employed in that office?

A. No.

Q. Were employees of the Anaconda Lead Products in that office?

A. You mean in the sales office?

Q. Occupying joint offices?

A. Well, the operating, sales and accounting departments all had their offices in East Chicago in the same building.

Q. Was it the same department with different accounts, or were they physically separated?

A. Will you state that question again, please?

Q. Was it a single office with different accounts, or were the sales and accounting offices of the three companies physically separated?

A. No, the offices were not physically separated, but there were different accounts, Anaconda Sales Company and the Anaconda Lead Products Company.

Q. For bookkeeping purposes?

A. That is right.

Q. Now, when you sold dry white lead at that time, was that transferred on the books from Anaconda Lead
3555 Products Company to Anaconda Sales Company to International Smelting & Refining Company, or do you know how that was handled?

A. If a sale was effected through the Anaconda Sales Company, I would say that there would be a transfer from Anaconda Lead Products Company to the Anaconda Sales Company.

Q. How, would you effect such a sale in the name of the Anaconda Lead Products Company in your capacity as salesmanager in that district?

A. I would not effect it, no. I would simply sell the material.

Q. You were the one who would make the sale?

A. That is right.

Q. Would you know in advance for which account it would be sold?

A. To some extent that would depend upon the immediate shipping point to the customer.

Q. In other words, there were certain territories in which accounts were for the Anaconda Sales Company?

A. That is right.

Q. Anybody located in that territory?

A. That is right.

Q. But that was the only basis of division?

A. That is right.

Q. Now, was part of your compensation paid by Anaconda Sales Company, part by Anaconda Lead Prod-
3556 ucts, or were you an employee solely of International Smelting & Refining?

A. I understand that I was an employee solely of the International Smelting & Refining Company.

Q. You don't know whether the other two companies were compensated for your services in selling for their account?

A. I don't know about the Anaconda Lead Products Company. I don't think the Anaconda Sales Company was, but I am not sure of it.

Q. Now, when the International Smelting & Refining Company acquired the plant of the Anaconda Lead Products Company in 1936, will you tell us just what changes of organization were made necessary as a result of that, what shifts of personnel, changes in methods of handling business?

A. Well, as I recall it there were practically no changes. I don't remember any that were made at the time.

Q. In other words, business was continued on. It was largely a bookkeeping transaction?

A. That is right, pretty much the same as before.

Q. Didn't you consider yourself an employee of the Anaconda organization, I mean disregarding the technicalities now?

A. Well, I think that I am a direct employee of the International Smelting & Refining Company.

Q. Did you ever attend any meeting of the Board of Directors of the Anaconda Sales Company?

A. No, sir.

3557 Q. Did you ever see any minutes of a meeting of the Board of Directors of that company?

A. I don't recall that I ever did.

Q. Do you know whether there has ever been a meeting, to your knowledge?

A. I don't know of any actual meetings, but I presume there have been.

Q. Do you know Mr. F. O. Case?

A. Yes, I do.

Q. What was Mr. Case's position in 1933?

A. In 1933, I believe—I am not too sure of the date—I believe he was general salesmanager.

Q. Of what company?

A. Of the International Smelting & Refining Company, pigment division.

Q. In other words, he was your superior officer at that time?

A. That is correct.

Q. He was not an employee of the Anaconda Sales Company or of the Anaconda Lead Products Company?

A. I don't believe so.

Q. Is he still with the Anaconda organization now?

A. Mr. Case is with the Anaconda organization.

Q. What is his position now, do you know?

A. I understand his position at the present time is assistant to the president of the Anaconda Copper Mining Company.

3558 Q. How long has he been in that position?

A. I think since about October of 1946.

Q. For how long a period of time did he remain with International?

A. I believe Mr. Case originally went with International about 1920 or 1921.

Q. How long did he remain?

Mr. Gardiner: If your Honor please, I don't know just what counsel has in mind here by this line of examination, but we are perfectly willing to stipulate that these companies—Anaconda Lead Products, Anaconda Sales Company and International Smelting & Refining Company—were all subsidiaries of the Anaconda Copper Mining Company, and the Anaconda Lead Products Company is today, and the Anaconda Sales Company, if that will facilitate matters.

Trial Examiner Norwood: Is that satisfactory?

Mr. Wright: I appreciate that there is no issue there, but counsel has raised the issue that the acts of these subsidiaries could be placed in a separate compartment, and neither had any responsibility for either of the others might have done. I think I have a right to bring out, since this question of this witness' relationship to the Anaconda Copper Mining Company was brought out on direct examination, this relationship on cross-examination.

3559 Trial Examiner Norwood: Yes, this is cross-examination.

Mr. Gardiner: I am not objecting, but I did not know what he was after.

Trial Examiner Norwood: Counsel may except that offer to stipulate in whole or in part, and be governed accordingly.

Mr. Wright: Well, there never was any issue as to whether there was a relationship of principal to subsidiary.

Trial Examiner Norwood: All right.

By Mr. Wright:

Q. When did Mr. Case leave International and go with Anaconda?

A. I believe that was about October of 1946. Correction. Mr. Case left International, I believe, about two years before the war ended to go to Las Vegas, Nevada, as general manager of Basic Magnesium, Incorporated.

Q. But up until that point he still had a connection with International?

A. That is my understanding, yes.

Q. So during the period from 1930 to '36, he was in charge of sales policies on these pigments of International?

A. I believe that is correct.

Q. From whom did he get his authority to act in determining sales policies in that period?

A. Well, I believe that Mr. Case pretty much
3560 developed his own policy as regards things.

Q. In other words, he was directly subordinate to the officers and directors of the International Smelting & Refining Company?

Mr. Gardiner: If Your Honor please, I do not want to object to each question, but I think the witness testified here as to his belief in these matters rather than what he knows.

Mr. Wright: Your Honor, this witness has testified, we did this and we did that, all morning, with regards to

the period from 1930 on. Now, if counsel wants to urge that he has no authority to state what the company's policies were in that period, I am going to move to strike his direct testimony.

Trial Examiner Norwood: I think he may go ahead and state his views.

Mr. Gardiner: He was asked, where did Mr. Case get his instructions. Is that correct?

Mr. Wright: That is correct.

Mr. Gardiner: And his answer was, "He believes." In other words, he must know that.

Trial Examiner Norwood: He may make his own statement whether it be belief or whether it be direct knowledge.

By Mr. Wright:

Q. Mr. Case was your immediate superior from
3561 whom you took your instructions, I take it, during that period from 1930 to 1936?

A. That is right.

Q. And you discussed the policies of the organization with Mr. Case; is that correct?

A. Yes.

Q. And you and Mr. Case determined those policies; is that correct?

A. I would not say Mr. Case and I alone. We had Mr. L. G. Duncan, who was salesmanager with his office at Akron, Ohio.

Q. Salesmanager for International?

A. That is right, up until the time I was made salesmanager.

Q. Who in the corporate organization was Mr. Case responsible to?

A. I do not know.

Q. You know of no one between the officers and directors, then, and Mr. Case in authority in International Smelting & Refining?

A. I cannot name any individual to whom he directly reported on these matters. That is something that Mr. Case handled himself.

Q. You do not know of his getting any instructions from the board of directors or the corporate officers as to the company policy?

3562 A. I do not recall any specific instructions he got that would affect the sales policy.

Q. Now did you in the period from 1933 to 1944 partici-

pate in any of the Lead Industries Association pigment division meetings?

A. No.

Q. Who handled that?

A. Well, if there was any participation on our part, I presume that Mr. Case would do it.

Q. So you were not present at any of those discussions to know what matters were discussed at those meetings between 1933 and 1944; is that correct?

A. That is correct.

Q. I believe you mentioned in your direct testimony this morning that there is a quarter of a cent differential, or discount, for carload purchases of dry white lead.

A. Uuder the less-carload price.

Q. Under the less-carload price; is that correct?

A. That is correct.

Q. Can you tell me how long that differential has been in force?

A. No, I cannot.

Q. Did you ever discuss that differential with Mr. Case, that you recall?

A. I do not recall it.

3563 You do not recall Mr. Case's having any interest in adopting such a differential?

A. I do not recall anything about it, either way.

Q. What is the International Lead Refining Company?

A. I think the International Lead Refining Company was a subsidiary of the International Smelting & Refining Company.

Q. I show you a document in evidence as Commission's Exhibit 508-B, which has been identified as a letter written by Mr. F. O. Case, Manager of the Anaconda Zinc Oxide Department, International Lead Refining Company, under date of July 24, 1933.

Does that refresh your recollection as to that?

A. As to what?

Q. As to the relationship of International Lead Refining Company?

A. I believe that when we built our Zinc Oxide Plant at Akron, Ohio, it was under the name of International Lead Refining Company, Anaconda Zinc Oxide Department.

Q. In other words, it was known as the Anaconda Zinc Oxide Department, even though it was part of the International Smelting & Refining Company; is that right?

A. That is correct.

Q. I call your attention to that paragraph of this letter beginning with the words "I am not certain," and ask you to read that.

3564 Mr. Gardiner: I believe this is a matter of record. It is in here.

You are asking him to read it to himself, are you not?

Mr. Wright: Yes, sir.

By Mr. Wright:

Q. Do you recall discussing the matters mentioned in the last paragraph of Commission's Exhibit 508-B with Mr. Case?

A. Apparently this applies to the Pacific Coast. I believe that in my capacity as district salesmanager, I had nothing to do with the Pacific Coast at that time.

Q. I want to call your attention to the fact, "And I understand that they are going to charge a differential of one quarter of a cent for all shipments under five tons," which is in addition to the Pacific Coast situation.

Do you recall that matter?

A. I do not know that I understand the question.

Q. Do you recall any discussion with Mr. Case about the advisability of adopting that about the date of that letter, July of 1933, a less than carload differential of a quarter of a cent on dry white lead?

A. For shipments under five tons?

Q. Yes, sir.

A. I do not recall that at all. In fact, I do not ever remember hearing or seeing anything about that five-

3565 ton differential.

Q. There is a five-ton differential, is there not?

A. There is not at the present time, or there was not when he went out of the business in 1946.

Q. Would you explain again for me Mr. Hurless, what you called your consignment arrangement on direct examination?

A. Orders would be taken from our salesmen for shipment on our consignment arrangement, or the customer would mail the orders direct to our office for shipment on the consignment arrangement.

Q. Did you offer that to any dealer that wanted it?

A. No, I do not think we offered it to any dealer that wanted it. We would try to restrict it to dealers who we thought would sell a reasonable amount of lead in oil.

Q. You say, there was no contract involved?

A. Not except in the State of Wisconsin.

Q. How did you bill your shipments of that lead?

A. The shipment was billed to the Anaconda Sales Company or the International Smelting & Refining Company in care of the account that was purchasing the lead in oil or that would purchase it eventually from consigned stock.

Q. Now, then, the customers who had that arrangement would file reports monthly showing what they sold in various sized containers; is that correct, during the month?

A. Our report had the different sized containers
3566 listed with a separate column for each one, from 100 pounds down to 1 pound.

Q. What did the dealer fill in those columns with? What sort of figure did he put in those columns? Simply pounds sold, or what?

A. As I recall it, we would put on the report before it was mailed the amount of stock that our books showed was on hand with the dealer and the amount of lead in oil that had been shipped since the date of the last report. The dealer would insert his present stock on hand, which would be the number of different sized containers.

Q. Then what was the billing transaction that followed that report?

A. When the report was received from the dealer, it went to the accounting department for processing; that is, issuance of invoice to him.

Q. And you billed him then for the dealer's net price on what was sold; is that correct?

A. We billed the dealer for the amount shown as shipped during the period at the current price.

Q. The current dealer price?

A. That is right.

Q. Over how long of a period of time did that arrangement obtain?

A. You mean, what period of time did we have
3567 the consigned stock arrangement?

Q. Yes, sir.

A. I do not know when we started it, but I—correction: I believe we started that the latter part of 1932.

Q. And over how long a period did you continue to use it?

A. We continued to use it until we went out of business in 1946.

Q. Did you have any announcements to the trade covering the terms and conditions of that consignment arrangement?

A. Well. when there was a price change either up or down, we always notified our dealers both on direct sale and consigned stock arrangement of the new prices, and gave them the terms of sale.

Q. You supplied those dealers with these price cards, such as are in the record in evidence here showing dealers' selling schedule, as in Commission's Exhibit 661-Z-36?

A. That is correct.

Q. As well as the dealers' confidential price list?

A. That is right.

Q. Getting back to the first time that the zone method of selling appeared on white lead in oil, I believe you said that was around 1933 or 1944, did you not?

A. It was around 1933, as I recall it. But I do not remember.

Q. The latter part of 1933?

3568 A. I do not know.

Q. How did you sell white lead in oil prior to that zone method?

A. Well, we really did not begin to get started in the business of producing and selling white lead in oil until well along in 1932, and I think that our methods were pretty much on a hit or miss basis.

Q. How did you first hear about this zone method of selling?

A. Well, something like that being instituted would naturally cause considerable comment initially, and we would pick up information from the dealers and prospective dealers on whom we were calling.

Q. Did these dealers have any zone maps or anything from any competitors?

A. I do not believe that I ever saw or heard of a dealer having a zone map.

Q. As I recall it, your testimony this morning was that you determined those zones from the information which you picked up in the trade from dealers and so forth?

A. That is correct.

Q. If the dealers did not have a zone map, how would you get the complete information for the whole country on those zones and the territorial divisions between them, and the differentials?

3569 We would pick it up piecemeal. For example, a dealer in the so-called Tri-State area or Rock Island, Davenport, and Moline, who was any kind or dealer at all

would know that in that territory where the par zone left off and the one-eight zone began. Then we could talk to a dealer or distributor in Richmond, Virginia, or vicinity, who would tell us where the par zone left off and the one-eight zone began in that territory.

Q. Are you telling us how you may have found that information or how you did find it?

A. I am telling you how we did find it, piecemeal, and put it together.

Q. Over how long a period of time did that obtain?

A. I do not know that I can answer that. We did not get it all at once. I know that.

Q. But you recall very well that process of piecing it together?

A. I remember that we had quite a time getting some of the information, and that we spent quite a little time and money doing it.

Q. Mr. Case also participated in that, I take it?

A. That is correct.

Q. Since he was salesmanager at that time?

A. Yes, sir.

Q. You don't recall Mr. Case mentioning that
3570 such maps or zones had been discussed at meetings of the Lead Industries Association, do you?

A. No, I do not.

Q. On dry white lead, as I recall your testimony, you stated that you allow freight to the customer. Does that mean that you ship the material freight collect, and allow the amount of freight that the customer shows has been paid on the invoice when billing for the material?

A. No, we prepaid all freight charges.

Q. At all times?

A. That is right.

Q. On all products?

A. That is right.

Trial Examiner Norwood: Now, do you allow the same freight that you paid on every package?

The Witness: Well, for example, if the price of white lead in oil were 10½ cents per pound in hundred pound containers, and we were shipping from East Chicago to Akron, Ohio, we would prepay the actual freight from East Chicago to Akron, Ohio, and bill the customer at 10½ cents a pound.

Trial Examiner Norwood: But in shipping it to dif-

ferent places in a zone, would you charge just the actual freight in every case?

The Witness: We would prepay the actual freight,
3571 and the customer did not actually pay any freight as such.

Trial Examiner Norwood: But the freight was figured in that price, was it?

The Witness: Yes, sir.

Trial Examiner Norwood: Was that same amount of freight figured in the price that you paid, or was it an average figure?

The Witness: Well, our price structure was that in the same zone we charged the same price, paid the actual freight to the point of delivery, whatever that freight might be.

Trial Examiner Norwood: And then charged an average freight differential or an average freight amount added into the price. Is that right?

The Witness: Well, you mean from a cost accounting standpoint?

Trial Examiner Norwood: That is right.

The Witness: I believe in figuring our costs we used an average figure for freight.

Mr. Wright: May we have a five-minute recess?

Trial Examiner Norwood: We will take a five-minute recess.

(A short recess was taken.)

Trial Examiner Norwood: Are you ready to go ahead, gentlemen?

3572 Mr. Wright: Yes.

Trial Examiner Norwood: Proceed.

By Mr. Wright:

Q. Do you recall a representative of the Federal Trade Commission calling on you in March of 1944 regarding the investigation the Commission was making in this case?

A. One representative called, but I don't recall the date.

Q. Do you recall Mr. Dunn, attorney-examiner for the Commission, calling on you?

A. As I remember, he was Mr. Carmichael.

Q. Do you recall making a statement to Mr. Carmichael at that time that the consignment practice of International was initiated in the fall of '33 rather than '32?

A. No, I don't.

Q. Going back to the parties, the different corporations that were involved here, did the International Smelting & Refining Company make any annual report to the stockholders or balance sheet showing its profit, losses, expenses and earnings?

Mr. Gardiner: If Your Honor please, I object to that question. I do not see the purpose of that, as to what report the International Smelting & Refining Company may have made to its stockholders. I don't see that that has any bearing in this particular case.

Mr. Wright: Well, Your Honor, he has certainly
3573 raised an issue here of the responsibility for the acts of these various subsidiary corporations, and it seems to me that that opens up the field pretty wide for determining their act relationship.

Trial Examiner Norwood: I think you may show it for that purpose. The objection is overruled.

The Witness: Will you read the question, please?

Trial Examiner Norwood: Read the question.

(The pending question was read.)

A. Well, in my capacity in sales, I would really have nothing to do with that sort of thing, and I don't know what was done in that respect, if anything.

By Mr. Wright:

Q. Would your answer be the same if a similar question were asked relating to Anaconda Lead Products Company?

A. Yes.

Q. And Anaconda Sales Company?

A. Yes.

Q. Now, did this office in East Chicago, Indiana, in which you were located, do business for the account of the Anaconda Copper Mining Company?

A. I don't believe it did.

Q. You don't know of any business it had in that regard?

A. No, I do not.

Q. There were no employees of Anaconda, as
3574 such, located in this office?

A. No direct employees of the Anaconda Copper Mining Company, to my knowledge.

Q. But there were employees of the three subsidiary corporations?

A. I don't believe we had any employees of the Anaconda Sales Company at East Chicago.

Q. Well, weren't all the sales of Anaconda Sales Company of these pigment products made through your office?

A. Well, we made the sales, as such, through our regular sales organization. In those States where the International Smelting & Refining Company was not licensed to do business, the sales were made through the Anaconda Sales Company.

Q. Did you have anything to do with the advertising policies of the company with reference to these pigments?

A. I would not say I had anything to do with the policies, but I did have considerable to do with the development of advertising.

Q. Where was this advertising run principally, in what media?

A. Are you speaking now of white lead in oil or dry lead or zinc oxide?

Q. If you can make one answer covering white lead in oil and dry white lead, that will be all right. If you cannot, just separate the two.

3575 A. I think that we ran some advertising on dry white lead in the American Paint Journal, and I think we ran advertising on white lead in oil in the American Painter and Decorator and in the National Painters Magazine.

Q. Do you recall an advertising campaign by International to the effect that its white lead was whiter than other preparations on the market?

A. Our what you might call slogan "Whiter and brighter."

Q. Do you recall advertisements of the sort I referred to, that your white lead was brighter and whiter than competitive products?

A. Yes, we advertised that.

Q. Did you advertise showing a spot of Anaconda white lead over white lead of a competitor?

Mr. Welch: Your Honor, we object to this. This case is not a false representation case; this is a conspiracy case. I don't think that kind of question is proper.

Trial Examiner Norwood: I think it goes to the matter of competition.

Mr. Wright: If Your Honor will bear with me, I believe my purpose will be plain. If it is not sufficiently connected up, I will be happy to entertain a motion to strike.

Trial Examiner Norwood: Objection overruled. Answer the question.

The witness: May I have the question, please?

3576 (The pending question was read.)

A. We advertised that Anaconda white lead will make a white spot on ordinary lead.

By Mr. Wright:

Q. Over what period of time did you advertise that fact?

A. Over a considerable period of time.

Q. Well, can you give me some estimate of what that was?

A. Well, I would say probably a five-year period.

Q. What five years is what I meant.

A. I would estimate that perhaps from 1933 or '34 to 1938 or '39.

Q. In 1938 or '39, did you have anything to do with representing International in the Lead Industries Association, in white lead in oil or pigments?

A. I did not represent International. I believe that I was aware that they were conducting a campaign to further the use of white lead in oil.

Q. Did you attend any meetings of the association?

A. I attended one meeting at which, I believe, we discussed the media for advertising.

Q. Do you know of any discussion ever taking place before any group of the Lead Industries Association with reference to your advertising of your white lead as whiter than competitors' white lead?

A. I don't recall of any.

3577 Q. No discussion of it in your presence?

A. Well, there wasn't any discussion of it in that one meeting at which I was present.

Q. Then you don't know of any other meeting at which some discussion might have taken place?

A. No, I don't.

Mr. Wright: I have no further questions.

Redirect Examination by Mr. Gardiner

Q. Mr. Hurless, referring back to your activities as a salesman at East Chicago, did you sell any products for any of the companies that were mentioned besides white lead in oil and dry white lead?

A. Will you repeat the question, please?

Trial Examiner Norwood: Read it.

(The pending question was read.)

A. When I was a salesman selling dry white lead and white lead in oil, I also sold zinc oxide.

By Mr. Gardiner:

Q. Over what period did you sell zinc oxide?

A. Well, I sold zinc oxide for the same period of time that I sold lead pigments.

Q. You have testified, Mr. Hurless, that you have made sales on behalf of Anaconda Sales Company, Anaconda Lead Products and International. So far as you know,
3578 was there any reason why there could not have been a cost accounting arrangement so that your services were charged to any one, segregated and charged to any one or all three of those companies?

Mr. Wright: I object to that question, if Your Honor please.

Mr. Gardiner: On cross-examination the question was raised several times as to whether or not this witness worked for one of these companies, and he testified that he sold material for them. I am merely bringing out the fact or attempting to bring out the fact that he could have worked for those various companies and been compensated by one company.

Mr. Wright: The question wasn't whether or not there was such an arrangement.

Trial Examiner Norwood: I think the question is objectionable for several reasons. One is that you asked him what could have possibly been there, whether or not such a situation could have obtained, and also it was a leading question. I think I will sustain the objection. You may bring out just exactly what the circumstance is by some other question.

By Mr. Gardiner:

Q. Were you at all times at East Chicago paid by International Smelting & Refining Company?

A. As I recall, the pay checks were those of the
3579 International Smelting & Refining Company.

Q. Do you know if there was any allocation as to your salary between the various companies for which you worked?

A. There may not have been any direct allocation of

salary, but my understanding is that we would charge the other—for example, the Anaconda Lead Products Company,—so much selling expense in which there would be some charge for salary.

Mr. Wright: I object to that, Your Honor, as to what his understanding is. He is not tesifying as to facts.

Mr. Gardiner: If Your Honor please, there was a lot of testimony by this witness both on direct and cross as to understandings, beliefs, and so forth.

Mr. Wright: We are talking about something which can be ascertained correctly, Your Honor. This is not a matter which needs to be proved by speculation.

Trial Examiner Norwood: Objection overruled.

By Mr. Gardiner:

Q. When you sold white lead in oil in the par zone, what consideration was given to the freight to the points within that zone in computing your price?

A. No consideration was given to it.

Q. How did you arrive at your prices for the par zone?

A. The only way we arrived at our prices for the par zone was by establishing what our competitors' prices were and setting our prices accordingly.

3580 Q. Were your sales of white lead in oil at any time computed on the basis of your freight rates?

A. No.

Q. When you say that you allowed freight to a destination, what did you mean by that?

A. I meant that we actually paid the freight from East Chicago to the point of delivery.

Q. In the par zone, when a customer purchased white lead in oil, what did he pay for it, above the list price?

A. For Example, if the price for white lead in oil in the par zone was 10-½ cents per pound for 100 pound containers, that is what he paid, less his cash discount if he took it within the cash discount period.

Q. And was that true in the other zones, with the exception that the differential was applied within those zones?

A. That is correct.

Q. A moment ago in answer to a question, you said that you figured your cost on your freight in computing your prices. What did you mean by that?

A. I misunderstood the question. What I had in mind then was, if we were figuring production costs, for example,

for our own use, we would take an average rate or an average selling cost in figuring those production costs. But in establishing our prices to the customers, our prices were always based on competitive prices, and we did not
3581 figure them by including the freight charges.

Q. So that when you say you figured freight rates in computing costs, that was merely for the purpose of determining whether or not you were operating at a profit or a loss or how much of either; is that correct?

A. That is correct.

Mr. Gardiner: May we have a recess for a short period of time, Your Honor?

Trial Examiner Norwood: How long do you want?

Mr. Gardiner: Three minutes.

Trial Examiner Norwood: We will take a three minute recess.

(A short recess was taken.)

Trial Examiner Norwood: The hearing will come to order.

By Mr. Gardiner:

Q. In the sale of white lead in oil, did you compete with a similar material produced by National Lead?

A. Yes.

Q. In your opinion, how did those two compare from the standpoint of quality?

A. We considered that our quality was superior to that of the National Lead Company, and we played that up in our advertising.

Q. Was there any price differential between the
3582 material that you sold and that of National Lead?

A. We sold at a quarter of a cent under the price at which National Lead Company sold. That is for lead in oil.

Trial Examiner Norwood: When was that? All the time?

The Witness: I would say that it was after we became fairly well established in the lead in oil field.

By Mr. Gardiner:

Q. And what was the reason you sold for a quarter of a cent below National Lead?

A. We sold our lead in oil a quarter of a cent below the price of National Lead Company because we had what at that time was a comparatively unknown product—

Trial Examiner Norwood: I think we went into that this morning and explained that fully.

Mr. Gardiner: Very well.

Mr. Wright:: We have gone into that fully.

By Mr. Gardiner:

Q. Did you compete in the sale of white lead in oil with Eagle-Picher?

A. Yes.

Q. What, is your opinion, was the quality of their product with relation to yours?

A. I do not think the quality of the Eagle-Picher white lead in oil was as good as ours, particularly as regards
3583 color.

Q. Did you sell it on the same basis as Eagle-Picher?

A. No; we sold our lead at a quarter of a cent per pound under the price Eagle-Picher charged for their white lead in oil.

Q. And why was that?

A. For the same reason that we sold under the price of the National Lead Company. The Eagle-Picher product was not as well accepted and as well known as the National Lead Product, but it was a very well known product as compared to our comparatively unknown product.

Mr. Gardiner: That is all.

Recross-Examination by Mr. Wright.

Q. About this understanding that you have that your services can be had by other Anaconda subsidiaries and billed to those subsidiaries, will you go into that further?

A. I cannot say that I know what the arrangement was there. But I think that, for example, the sales department would, each month, assess the white lead department, the lead in oil department and the zinc oxide department with a certain amount of selling expense for each department.

Q. Those are departments of International now that you are speaking of?

A. Yes.

3584 And the same would be true of the Anaconda Lead Products Company.

Q. All right. Is that conjecture, or do you know that that was done as to Anaconda Lead Products Company?

A. I could not definitely say that I know it was done as regards Anaconda Lead Products Company, but I can say definitely I know it was done as far as the other departments of International were concerned.

Q. But not outside of International?

A. I cannot definitely say. I believe it was, but I cannot definitely say so.

Q. Where are the main offices of International?

A. In New York City.

Q. 25 Broadway?

A. Yes, sir.

Q. That is the office that is listed here on the price card such as Commission's Exhibit 661-Z-193, as a district office?

A. At that time, we had a district sales office at 25 Broadway, but later it was moved to the Graybar Building, and was in the Graybar Building until we discontinued the manufacture and sale of lead pigments.

Q. I call your attention to 61-Z-194, which is in October, 1939. It shows the district office at 25 Broadway.

A. That is correct.

Q. That is the main office of the Anaconda Copper
3585 Mining Company, is it not?

A. Yes, sir.

Q. Now, do I understand, Mr. Hurless, that it has been your experience that you have been handling the sale of these pigments, and that your prices as far as your company is concerned, are set by your competitors? That is, you follow what your competitors do?

A. Our prices were based on what our competitors were doing.

Q. Yes. And those have been the same prices in so far as the dry product is concerned?

A. Yes.

Q. And the difference between that and white lead in oil was in effect that you would compensate the dealer 25 cents per hundred more than your competitors; is that correct?

A. That is correct.

Q. You consider that your company has had freedom of—

Mr. Gardiner: If Your Honor please, I object to that conclusion on the part of attorney for the Commission

there. He says that we in effect give the dealer a compensation of 25 cents on the dollar more.

This witness has testified that there is no limitation on what the dealer sold his material for. Whether or not he elected to sell it for the same price as our competitors or at a different price was entirely in his province.

Mr. Wright: I used the words in that question,
3586 Your Honor, that the witness used himself on his direct testimony this morning.

Trial Examiner Norwood: Objection overruled.

By Mr. Wright:

Q. Do you consider that your company has a complete freedom of action in this industry as far as prices are concerned?

A. Well, we set our own prices.

Q. Well, now, you stated with this one exception that they are the prices that are set by your competition.

A. Well, we had the same prices that they were charging, with that one exception.

Q. That is what you mean by freedom of action?

A. We were free to do as we saw fit to do.

Q. In other words, then, you could have set prices lower if you had wanted to, or on a different basis, if you had wanted to, on these various products?

A. Any limitation was really due to conditions such as costs and so forth, not on the part of our competitors.

Mr. Wright: No further questions.

Mr. Gardiner: That is all we have for Mr. Hurley as far as the International Smelting & Refining Company is concerned, and Anaconda. We have no further witnesses at this time.

We would however, like the privilege at a later
3587 date of introducing further testimony.

Mr. Wood: I will have four witnesses tomorrow and Thursday. I would not elect to proceed today.

Trial Examiner Norwood: Is there anything further to come before the Commission today?

(No Response.)

Trial Examiner Norwood: The conclusion is obvious, that we recess until 10 o'clock tomorrow morning.

The hearing is adjourned until that time.

(Thereupon, at 3:20 o'clock p. m., the hearing was recessed until 10 o'clock a. m., Wednesday, September 17, 1947.)

Hearing Room
3588 Federal Trade Commission
Washington, D. C.,
September 17, 1947.

Met, pursuant to adjournment, at 10:00 a. m.

Before:

J. W. Norwood, Trial Examiner.

Appearances:

James D. Ewing and E. Z. DuBose, Attorneys for the Respondent National Lead Company.
(120 Broadway, New York, New York.)

Edmund T. Wood and Richard Serviss, Attorneys for the Respondents Eagle-Picher Lead Company and Eagle-Picher Sales Company.
(American Building, Cincinnati, Ohio.)

3589 Henry E. Gardiner, Attorney for the Respondents Anaconda Copper Mining Company and International Smelting & Refining Company.
(120 Broadway, New York, New York.)

James T. Welch, Attorney for the Respondent The Sherwin-Williams Company.
(815 15th Street, N. W., Washington, D. C.)

Joseph S. Wright and Paul R. Dixon, Attorneys for the Federal Trade Commission.

3590 PROCEEDINGS.

Trial Examiner Norwood: The hearing will come to order.

Pursuant to adjournment on yesterday, the hearing in Docket 5253 is now reconvened for the reception of further evidence on behalf of respondents, in Room 332 of the Federal Trade Commission, Washington, D. C., at 10 o'clock a. m. on the 17th day of September.

The appearances are as follows:

Edmund T. Wood and Richard Serviss representing Eagle-Picher Company and Eagle-Picher Sales Company.

James D. Ewing and E. Z. DuBose, representing National Lead Company.

Henry E. Gardiner, representing Anaconda Copper Mining Company and International Smelting & Refining Company.
James T. Welch, representing the Sherwin-Williams Company.
Joseph S. Wright, representing the Federal Trade Commission.

Will you call your first witness?
Mr. Wood: Mr. W. W. Vasterling.

W. W. VASTERLING was thereupon called as a witness for the respondents Eagle-Picher Company and Eagle-Picher Sales Company, and, having been first
3591 duly sworn, testified as follows:

Direct Examination.

Trial Examiner Norwood: Will you proceed?

By Mr. Wood:

Q. Would you please state your residence and occupation?

A. Kansas City, Missouri; Technical Director, Davis Paint Company.

Q. How long have you been in the paint business?

A. Since August of 1921.

Q. How did you start in the paint business?

A. I started in the paint business with the Campbell Paint & Varnish Division of the Glidden Company, Washing laboratory equipment, and so forth.

Q. How old were you when you started?

A. 15.

Q. What positions have you held since?

A. In the course of the years, I have held the position of technical director of the Campbell Paint & Varnish Company, plant superintendent of the Campbell Paint & Varnish Company, industrial salesman for the Phelan-Faust Paint Company, and technical director of the Davis Paint Company.

Q. How long were you with Glidden?

A. 12½ years.

Q. And how long were you with the second company you mentioned?

3592 A. Nine months.

Q. Nine months?

A. That is right.

Q. And how long have you been with the Davis Paint Company?

A. Since December of 1934.

Q. Will you describe the business of the Davis Paint Company?

A. The Davis Paint Company are essentially engaged in the manufacture of what is known in the industry as trade sales, comprising such products as exterior house paints, architectural enamels, decorative enamels, and such other allied products.

Q. How do you sell your products?

A. Our products are sold through our own stores, through associate stores, through dealers and direct mail order.

Q. With what companies does the Davis Paint Company compete?

A. With all companies who operate in the same territories in which we operate.

Q. Will you name some of them?

A. DeVoe, Glidden, Sherwin-Williams, DuPont, Armstrong.

Q. How about Montgomery Ward?

A. Montgomery Ward, Sears-Roebuck, Western Auto Supply.

Q. Now, on exterior white house paint, what is the general price range of the products offered in the Kansas City market?

3593 A. You mean the retail market?

Q. Yes.

A. At the present time, the retail prices of outside white in the Kansas City area range from $4.33 per gallon to $5.34 per gallon.

Mr. Wright: Your Honor, I move to have the answer to that last question stricken, because the present market price of paint in the Kansas City area is certainly irrelevant and inadmissible to this proceeding. The question relates to a period of time considerably subsequent to the date of the amended complaint.

Trial Examiner Norwood: He may want that as a basis of comparison. Let us see what he has to say.

Mr. Wood: It seems to me, Your Honor, that that is just simply background of the general competitive conditions.

Trial Examiner Norwood: I will overrule the objection. You may ask the question.

By Mr. Wood:

Q. Over a period of years, what have been the prices of exterior white house paint in the Kansas City market, if you remember?

A. I would say prior to 1942, the retail prices were in the neighborhood of $2.95 to $3.25.

3594 Trial Examiner Norwood: Is that outside paint that you are talking about?

The Witness: That is correct.

By Mr. Wood:

Q. Has there been over a period of years a spread in the prices of exterior white house paint?

A. Yes, there has.

Mr. Wright: Your Honor, I am going to object to further questions along this line regarding the price. This witness has not been qualified as an expert in marketing problems. By his own testimony, most of his time, if not all of it, has been spent as a technical director in the production of paint.

There has been no qualification of him as an expert in marketing or sales of paint. And these questions are calling for opinion answers, not related to his own experience.

Trial Examiner Norwood: I do not want this witness to give an opinion answer. He may tell us about the prices if he knows them. I want him to answer them of his own knowledge, and if he does that, whether he is an expert or whether he is a price maker or not does not make any difference.

Were you answering those questions from your own knowledge, Mr. Vasterling?

The Witness: Yes, sir.

3595 Trial Examiner Norwood: I will let him answer. Objection overruled.

By Mr. Wood:

Q. What sort of technical department does the Davis Paint Company have?

A. We have myself and another man who perform more or less the compounding of our products and testing them, and so forth, and making up our formulations.

Q. Do you have any research department?

A. Very well.

Q. What is the nature of it?

A. Our research is limited to making tests on the paints and testing them on exterior exposure panels of our own formulations.

We rely to a great extent on our suppliers for a lot of our technical information.

Q. Will you please explain that last remark in greater detail, that you rely on your suppliers for technical information?

A. Most pigment suppliers maintain large technical staffs. Their knowledge is distributed to paint manufacturers whose own technical staffs are limited due to the fact that the cost of operating the staff is exorbitant to the smaller manufacturers.

The information is given to us in the form of cor-
3596 respondence between ourselves and our suppliers on specific problems, and on problems of general interest is usually broadcast in the form of a bulletin from the supplier.

Q. How does your own technical department compare with the technical department of the Glidden Company, as you knew it at the time you were there?

A. The Glidden Company probably have, or did, at the time I was with them, about 20 or 25 people in their technical department. We have only two.

Q. What suppliers of pigments and materials have furnished the Davis Paint Company with technical service?

A. DuPont Company, the Eagle-Picher Sales Company, and the subsidiaries of the National Lead Company.

Q. What is the general nature of the technical service which they have supplied?

A. The general nature of those services is to bring to us the improvements that they have made in their processes which they hope in turn will help them to sell their products to us, and in that way help us to make our products better.

Q. And has that assistance been of any value to your company?

A. It has been of quite a value to us.

Q. In what respect?

A. It has helped us to improve our product beyond the point that we possibly would have improved it in
3597 the length of time that it takes to do those things.

For instance, they have quite a large research

program that developes certain information months or years ahead of the time that we possibly could get that information ourselves.

Q. What effect, if any, does that service have on the competitive position of your company in the industry?

A. It keeps us in a competitive position.

Q. What do you mean by that?

A. Certain of the national manufacturers sell paint. Also, they are manufacturers of the raw material.

We take technical information that they have assembled and incorporate it in our products to put us in the same competitive position that they are with their own products.

Q. Now, what technical service has the Eagle-Picher Company provided the Davis Paint Company?

A. The Eagle-Picher Company has provided the service to us of exposure of paints on their test fences which we have examined from time to time. They have also done formulating for us at our request, and their laboratories at Joplin, Missouri, are always open to anyone in the industry who cares to go there and examine what they have to offer.

Q. Has that service been of any value to your company?

A. Yes.

Q. Do other companies selling the same line of
3598 products as Eagle-Picher Company also offer your company service?

A. Yes, they do.

Q. What other products do you sell in your retail stores?

A. Will you repeat that question, please?

Trial Examiner Norwood: Will you read it, please, Mr. Reporter.

(The pending question was read by the reporter.)

By Mr. Wood:

Q. —besides paint?

A. We sell novelty items, chinaware, unpainted furniture, brushes, and painters' tools, and step ladders, and so forth.

Q. Do you sell white lead in oil?

A. Yes.

Q. What brands do you carry, in general?

A. Dutch Boy and Eagle.

Q. Why do you carry both?

A. There is a demand for both of them. The master painter usually makes up his mind that he prefers one over the other, and we have both for sale.

Q. Now, in respect to the items that you carry in your stores that you do not manufacture yourselves, do you have any preference in respect to how you buy; that is, whether you buy on a delivered price basis or on an f. o. b. basis?

A. We would much rather buy on a delivered price basis.

Q. Why?

3599 A. Well, there is an accounting problem involved, and when you purchase on a delivered price basis, you know exactly what that price is going to be. When you buy on the basis of the shipping point, you have to assemble all of your invoices, your freight bills, and go through an accounting to get the final figure.

Q. In your own bookkeeping, how do you carry the goods that you have on your shelves?

A. We carry our goods on a delivered price basis.

Q. In other words, on what they cost you on your shelves?

A. That is correct.

Q. Whether you buy f. o. b. or whether you buy delivered price?

A. That is right.

Q. You carry them at what they actually cost there on the shelf?

A. That is right.

Q. Now, on the lead pigments that you utilize in your paint, are they standard, uniform products as offered to you?

A. They are standard products, but they are not always uniform.

Q. In what sense are they not uniform?

A. Their physical characteristics vary, depending upon the process of manufacture.

Q. Could you give us an example?

3600 A. Yes. Two pigments which are offered as basic lead sulphate from two different suppliers would have different oil absorptions. They would produce paints of different viscosities, or body, while they are the same product chemically.

Q. What determines which product you want?

A. That is up to us to determine which is best for our product, the way we want to make it.

Q. Now, what products do you buy from Eagle-Picher?

A. Leaded zinc and basic lead sulphate.

Q. Now, is Eagle-Picher's leaded zinc all alike?

A. No.

Q. What are the differences in the grades, as far as you know them?

A. Eagle have two producing plants of leaded zinc. One of them is located at Hillsboro, Illinois; the other one is located at Joplin.

The leaded zincs which we are purchasing from the Eagle-Picher vary in physical nature depending upon which plant they are produced in. One material, the material that is produced at Hillsboro, is not an identical material physically with the material produced at Joplin.

Q. Are they the same price?

A. Yes, sir.

Q. Which material does your company take?

3601 A. We prefer to have the material delivered from Hillsboro.

Q. Why?

A. Because in our product it gives us the desired properties which we want, which we do not get with material that is delivered from the Joplin smelter.

Q. Which is the closer to you?

A. Joplin.

Q. But you prefer it from Hillsboro, Illinois?

A. Yes.

Q. And that is sold to you at the same delivered price regardless of what plant it is from?

A. Yes.

Q. Now, does this difference in physical characteristics of lead pigments apply to other products or just to leaded zinc?

A. That applies to both pigments.

Q. Have you ever purchased basic lead sulphate from Eagle-Picher in the past?

A. Yes.

Q. Do you find any difference in the quality of that from plant to plant?

A. I do not know.

Q. Have you tried the lead pigments of various pigment manufacturers in your business?

A. Yes.

3602 Q. And do you find that products with the same chemical name have differences?

A. Physical differences.

Q. Are those differences of importance to you as a paint formulator?

A. They are quite important.

Q. Do these pigments have different values to you?

A. Yes.

Mr. Wood: Could we have a five minute recess, Your Honor? I think we are about through with this witness.

Trial Examiner Norwood: We will take a five-minute recess.

(A short recess was taken.)

Trial Examiner Norwood: We will proceed.

Mr. Wright: Your Honor, I want to request a requestration of the witness here.

Mr. Wood: I see no point in sequestering witnesses. Our only other witness is going to testify on a different subject.

Mr. Wright: They are both outside witnesses. Now, I have no idea of what the examination is, but neither of the witnesses is in any way connected with the Eagle-Picher Company.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

3603 Trial Examiner Norwood: Back on the record.

Mr. Mitchell will withdraw and remain within call. You may arrange with your counsel there. You can go up to the library on the eight floor.

Mr. Wood: We are going to be through with this witness in just a few minutes. I think Mr. Mitchell might as well stay in this corridor.

Trial Examiner Norwood: Proceed.

By Mr. Wood:

Q. What pigment manufacturers solicit your company's business?

A. The DuPont Company, the New Jersey Zinc Sales Company, The Glidden Company, the Sherwin-Williams Company, the National Lead Company, and the Eagle-Picher Sales Company.

Mr. Wood: You may cross-examine.

Cross-Examination by Mr. Wright.

Q. I understand from your testimony that you have been with the Davis Paint Company since 1934 as a technical director, Mr. Vasterling. Is that correct?

A. Yes.

Q. Is that a corporation?

A. Yes.

Q. Its principal office is in Kansas City?

A. Yes.

3604 Q. What was its dollar volume of paint sales, say, in 1942, roughly?

A. Around one million and three-quarters.

Q. A million and three-quarters.

A. Yes.

Q. Over what areas did it sell and solicit business in paint?

A. From the Rocky Mountains to the Atlantic Coast, from Canada to the Gulf.

Q. In other words, you have almost a national distribution except for the Pacific Coast?

A. Yes.

Q. Where are your stores located?

A. We have a company-owned store located in Kansas City, Missouri, Kansas City, Kansas, and Enid, Oklahoma.

A. You just have the three company-owned stores?

A. There are five company-owned stores in Kansas City, Missouri.

Q. I see. Where are your producing plants for paints and related products?

A. We have one producing plant at Kansas City, Missouri, and one producing plant at Cleveland, Ohio.

Q. How does the production of one plant compare with the other?

A. The production of the Kansas City plant is about 33 percent larger than the production of the Cleveland plant.

3605 Q. Is the bulk of your paint sold to dealers for retail?

A. Yes.

Q. What brands or trade names is it sold under?

A. Under the brand name of the Davis Paint Company.

Q. Do you make any different brand material?

A. Yes.

Q. For other marketers?
A. Yes.
Q. Do you make a full line of paint products?
A. We make a full line of products which are generally accepted as trade sales items.
Q. You spoke of having been supplied services by subsidiaries of the National Lead Company.
Who were those subsidiaries that you were referring to?
A. The Titanium Pigments Corporation.
Q. Is that the only one you had in mind when you made that answer?
A. Yes.
Q. What products do you purchase from them?
A. We purchase titanium oxide and titanium-calcium pigments.
Q. Are those pigments in competition with the white leads?
A. Definitely.
Q. Is the Titanium Pigments Corporation one of the principal producers of titanium pigments?
3606 A. Yes.
Trial Examiner Norwood: We will suspend for a few minutes.
(A short recess was taken.)
Trial Examiner Norwood: Proceed.

By Mr. Wright:

Q. You testified, as I recall it, that prior to 1942 your outside lead paints sold in the price range of $2.95 to $3.25 a gallon; is that correct?
A. I testified that outside white house paint sold at those prices.
Q. Yes. In 1936, was that price range about reflective of the market?
A. I do not recall that far back.
Q. Do you recall anything about the competitive situation in the mixed paint business at that time?
A. There were various prices at which the product was sold.
Q. Do you recall prices being in some instances lower than that $2.95 for outside white house paint?
A. I do not recall that they were lower.
Q. Is that generally a competitive item in times of, shall we say, a buyers' market?

A. Highly competitive.

Q. Highly competitive. Is it an item were price may be a determining factor in getting business?

3607 I am speaking now of the period prior to 1942.

A. That would depend upon the efforts of our sales people to sell their customers.

Trial Examiner Norwood: Will you speak just a little more loudly, please?

By Mr. Wright:

Q. You stated that you would rather purchase on a delivered price than on a factory price. As I recall your testimony, that is because of the inconvenience of not knowing exactly what the stuff cost you laid down in your stores; is that correct?

A. Yes.

Q. Did you have in mind there equal prices? Where the cost was equal, would you rather have a delivered price than an f. o. b. price? Is that what you had in mind?

A. What do you base that equal price on?

Q. Let us take an assumption that you could buy a lead pigment out of St. Louis at $9 per 100, and it would cost you $1 per 100 freight to get it into your plant in Kansas City, or you could buy at $10 delivered in Kansas City. In that case, the cost to you would be equal whether you bought it on a delivered price or on a quotation at St. Louis. Was it that situation that you had in mind?

A. As long as the material was delivered to our competitors at the same price.

3608 Q. I am asking you whether—

Mr. Wright: I move that that answer be stricken as not responsive.

Mr. Wood: No, the answer was responsive. The question is a difficult question.

Trial Examiner Norwood: Read the answer.

(The answer was read by the reporter.)

Mr. Wright: The question, Your Honor, went to what he had in mind when he said that, and I was trying to bring out from him whether he had in mind that the f. o. b. plant price and delivered price were equal, and that he would prefer that.

Trial Examiner Norwood: You read that a little to fast for me. Will you read it again?

(The answer was again read by the reporter.)

Trial Examiner Norwood: I think he might explain that further.

Mr. Wright: It had absolutely no relation—

Trial Examiner Norwood: You mean that you would prefer the delivered price as long as your competitors had their goods delivered at the same price; is that right?

The Witness: Yes.

Mr. Wright: Your Honor, I must object to the answer to my last question. It had absolutely no relevancy to the point that I was trying to establish from this witness.

3609 I had not brought in competitors in any way in this matter.

I asked him simply whether, when he answered that he would prefer delivered prices, if he had in mind that in that preference the f. o. b. plant price and the cost of getting it would be the same as the delivered price. It has nothing to do with his competitors in any way.

Trial Examiner Norwood: Now, you asked a further question. But he qualified his answer by saying—

Mr. Wright: It was no answer to my question.

Trial Examiner Norwood: He qualified his answer, yes, to your question by saying that he would prefer the delivered price in those cases where his competitors got the same price. And you were questioning on a further matter.

Mr. Wright: Your Honor, I must except to my cross-examination's bringing in matters that counsel must put on on direct.

Mr. DuBose: What is that?

Mr. Wright: Or must establish on direct.

Trial Examiner Norwood: I think the answer may stand. I will deny the motion.

By Mr. Wright:

Q. Mr. Vasterling, let us take a hypothetical situation now.

We will assume that you have your option of buying basic lead carbonate either at $10 per 100 laid down in your Kansas City plant or $9 per 100 f. o. b. St. Louis.

3610 And we will assume for this purpose that the freight rate in St. Louis for a car at your siding in Kansas City is 75 cents per 100, so that by purchasing it under St. Louis f. o. b. price and paying the freight, you can obtain the material at 25 cents per 100 cheaper then at a delivered price.

In that instance, which would you prefer?

Mr. DuBose: I object on the ground that that is a hypothetical question, based upon a set of facts to which there is no proof.

Trial Examiner Norwood: Objection overruled. Answer the question.

The Witness: Economically, it would seem that the 25 cent saving would be advantageous, but we are going to ship the product which we make right back into the territory from which that lead is shipped from, and it may be offered to a paint company right next door at no freight at all. And if we do not have an equal price to what they have, then we are not in competition with them.

Mr. Wright: Your Honor, I move that that answer be stricken. It is argumentative and not responsive. It was in answer to my question as to which he would prefer.

Mr. DuBose: Your Honor, that was a hypothetical question that called for an opinion answer, which the witness gave.

Mr. Wright: The witness' answer related to his 3611 practices in shipping a finished product after it had been manufactured.

Trial Examiner Norwood: The witness gave his answer and explained his answer.

Mr. DuBose: Certainly.

Trial Examiner Norwood: I think we might just as well get his complete idea about this thing, about his prices, and why he prefers them.

He says in substance that he does not prefer to have it laid down in his mill at 25 cents cheaper because he has to ship it right back to the source of the raw material.

Is that the substance of your answer?

The Witness: Yes, sir.

Trial Examiner Norwood: Then he has indicated to you that he did not prefer to save that amount. Now, you can ask him anything else you want.

By Mr. Wright:

Q. Was that your answer, if you had the opportunity of purchasing your lead pigments by that means at 25 cents cheaper than you now can, that you would prefer to not take that saving? Answer that yes or no, please.

A. Yes.

Q. You would prefer to take it?

A. We would not prefer to take the saving.

Q. Irrespective of what your practice might be
3612. on your finished product?

A. Yes.

Q. How big would the savings have to be in purchasing on f. o. b. and paying freight before you would find you would prefer it over buying on the delivered price—50 cents a hundred or a dollar a hundred?

A. Well, we prefer to buy on a delivered price that we feel is being given to others as well as ourselves.

Mr. Wright: Your Honor, I move that that answer be stricken as not responsive, and the witness be requested to answer the question.

Trial Examiner Norwood: Read the question and answer first, and then counsel may speak.

(The question and the answer were read by the reporter.)

Mr. Wright: The question, Your Honor was at what point, if any, would the saving overcome his preference. He has already stated his preference.

Mr. DuBose: He has not completed his answer, if Your Honor please.

Trial Examiner Norwood: I wish you would complete your answer and tell us how big the savings would be to induce you to prefer the mill price and pay your own freight.

The Witness: Well, that is an awfully hard question to answer, because the cost of one single item in a product is reflected, of course, by the delivery price. It would
3613 take a considerably lower price to reflect any appreciable cost in a gallon of paint.

Now, economically you might say we would be foolish not to accept 25 cents or 50 cents a hundred, but it gets back to the same argument that we still have to ship our product back into a territory where that material is produced.

Trial Examiner Norwood: Well, what difference would that make?

The Witness: Well, if the lead were shipped, as inferred, on a mill plant basis, we would be in competition with other paint producers who are located nearer to that producing mill, and there the freight rate to their plant would be less than ours and would give them a lower delivered price.

Trial Examiner Norwood: Now, in case you save that 25 cents, wouldn't that give you a competitive advantage?

The Witness: Not if the company that were located half our distance from the mill were going to have 37.5 cents.

By Mr. Wright:

Q. Then I take it your answers to these questions are based not so much on your own reluctance to accept the 25 cents, but on the basis of your fear—that is, a part of that hypothetical situation I put to you—that people in St. Louis would be purchasing that lead at $9 a hundred with no freight at all?

A. That is correct, and we are in competition with
3614 those people.

Q. So that your reluctance is based on that competitive situation, and not on your desire to pass up any saving that you might effect in the cost of your materials that go into paint?

A. Well, I think I have stated our position.

Trial Examiner Norwood: Well, answer his question.

Mr. Wood: Read the question.

(The pending question was read by the reporter.)

The Witness: Yes.

By Mr. Wright:

Q. Mr. Vasterling, do the suppliers of the so-called white leads offer them to you in various different grades or standards for different purposes?

A. Yes.

Q. Do you recall the different grades of basic carbonate that are offered say by the National Lead Company?

A. Oh, I think they have a product called 111 and 333.

Q. What are the differences in those products, can you state?

A. The differences are in the oil absorption of the product and the amount of body that they will give to a paint, physical properties that they would give to a paint.

Q. Aren't there also differences as to he tinting strength or hiding?

There could be.

3615 Q. Well, those are made for particular purposes, then, aren't they? Those physical differences are calculated in advance by the manufacturers to serve specific purposes in the paint grinding industry?

A. Yes.

Q. Do other suppliers of basic carbonate attempt to make similar differences in their products to meet those same different requirements?

A. Yes.

Q. So that is it reasonable to say if you want a high oil absorption basic carbonate, you can get it not only from National, but from Eagle-Picher or other suppliers?

A. By comparison with the standard product that they manufacture, yes.

Q. So that while there are physical differences in the products various manufacturers offer similar differences in their product to meet similar purposes or requirements by paint grinders?

A. Yes, but a product offered in direct competition with another product may also have physical differences.

Q. Well, as far as basic carbonate is concerned, can you illustrate?

A. Yes, as far as basic carbonate is concerned.

Q. Well, will you tell us what you mean?

3616 A. Well, if you had the counterpart of Eagle-Picher's basic carbonate again the National Lead Product, you would find differences in the way it reacted in your paint system or formulation. While they would be offered to you as the same product of a competitive nature, in your own system or type of formulation they may give you differences.

Q. So that you would have to make slight adjustments in your manufacturing processes and formulations to account for those differences?

A. That is correct.

Mr. Wright: I have no further examination.

Trial Examiner Norwood: Any redirect?

Redirect Examination by Mr. Wood.

Q. Can you state briefly the history of the Davis Paint Company?

A. The Davis Paint Company was started roughly about 1922 by its present president, Mr. B. J. Davis, with an investment of under $2.00.

The company has grown since that time and expanded to the point where we have our own producing units, and are producing products in the neighborhood of a million and a half gallons a year since that time.

Q. About how many paint manufacturers are there in the United States, approximately?

A. Approximately 2500.

3617 Q. Now, when you use the term "mixed paint," What do you mean?

A. The term "mixed paint" relates to a product that is sold to the ultimate consumer in applicable form. That is to say that very little or no additional ingredients need be added for the application of the material.

Q. Now, what is the history of the mixed paint business?

A. The history of the mixed paint business has been one of bettering the product since their inception a good many years ago, I think around 1915 or '16 and was in direct competition for many years with white lead in oil, which was its chief competitor.

The quality of the product has been increased as time has gone on until we believe that the ready-mixed paint is an equal to white lead in oil, if not better, when it is properly compounded.

Q. When did titanium come into the market as a pigment to be used in mixed paint?

A. About 1921.

Q. Now, prior to that, what paints were used most generally for outside house paints?

A. Lead in oil was used quite a little, and paints that were prepared from leaded zinc and lithopone.

Q. What is the historical position of basic lead carbonate in oil in the paint industry?

3618 A. You mean as to the amount that is sold at the present time?

Q. No, historically, I said, in the past.

A. Well, lead in oil was an accepted product by the master painters for a good many years as a criterion to shoot at for a good surface coating.

Q. Over what period of years would you say?

A. Oh, possibly 70, maybe more.

Q. What is its present position? That is, what is the present position of lead in oil?

A. The present position of lead in oil is that its use is curtailed greatly by the acceptance of the buying public of the ready-mixed paint products.

Q. Are the ready-mixed paint products in competition with lead in oil?

A. Yes.

Mr. Wood: That is all.

Recross Examination by Mr. Wright.

Q. These 2500 paint manufacturers that you spoke of, Mr. Vasterling, do those include a very large number of small manufacturers who have relatively local distribution?

A. Yes.

Q. Who is the largest manufacturer of mixed paint in the United States?

3619 A. I believe Montgomery Ward is.

Q. The largest manufacturer?

A. Of ready-mixed paint.

Q. How does Montgomery Ward compare with Sherwin-Williams?

A. Well, I haven't seen figures recently on their production. I don't think I am qualified to answer that question.

Q. I take it from your answer, then, that you consider Montgomery Ward a larger manufacturer of paint than Sherwin-Williams?

A. Of outside house paint.

Q. I am talking about paint generally, in the field of paint.

A. Well, I would have to see some figures to answer that.

Q. You don't know?

A. No.

Mr. Wright: No further examination.

Mr. Wood: Thank you very much. (Witness excused.)

Mr. Wood: May we have a five-minute recess?

Trial Examiner Norwood: We will recess for five minutes.

(A short recess was taken.)

Trial Examiner Norwood: You may proceed.

Mr. Wood: Mr. Mitchell, please.

J. O. MITCHELL was thereupon called as a witness
3620 for the respondents Eagle-Picher Lead Company and Eagle-Picher Sales Company and, having been first duly sworn, testified as follows:

Trial Examiner Norwood: Give your full name.
The Witness: J. O. Mitchell.

Direct Examination by Mr. Wood.

Q. Will you please state your residence and occupation?
A. Kansas City, Missouri; manufacturer of storage batteries.
Q. What company?
A. American Battery Manufacturing Company.
Q. How large is the American Battery Manufacturing Company?
A. We have two different companies. The Kansas City company will do in the year we are in now close to about a million dollars worth of business.
Q. The Kansas City company?
A. Yes.
Q. And what is the other company?
A. The other company is the American Battery Products Company, St. Paul, Minnesota.
Q. And how big a business does it do, about?
A. It will do this year about $600,000 worth of business.
Q. Will you please give us a brief history of your companies, that is when they were started and how they were started?
A. We started in Kansas City in about 1936. We
3621 bought out a company that was bankrupt, and we continued with it in the same way, and changed our sales policy slightly.
Q. By continuing in the same way, you don't mean you continued in bankruptcy?
A. No.
Q. Now, in 1936 was your company a carload buyer of lead oxide?
A. No, it was a truckload buyer.
Q. Is it a carload buyer now?
A. A carload buyer now, yes.
Q. Has the business of your company increased between 1936 and the present time?

A. Yes.

Q. By about how much?

A. Oh, I would say from 1936 we did maybe $30,000 worth of business, and have increased from $30,000 up to about a million dollars worth of business.

Q. Now, what companies call on you to solicit your business in the sale of lead pigments, that is, battery oxides?

A. National Lead, and I guess all the different oxide companies at one time or another were trying to get our business and called fairly regularly. National Lead and Eagle-Picher are the two that fight over it the most.

Q. And are their products exactly similar to one another?

A. No, they are very different.

3622 Q. What are some of the differences?

A. Well, with Eagle-Picher oxides, the main reason we use them is that they have what is referred to as a cold mix. We can mix our oxides with water, mix them in about two minutes, and after the oxide is used, after the plate has been made, the plates can be put in the battery within a matter of two or three hours. When we take that same oxide to the forming room, it can be formed and charged in one operation. We don't have to dump the battery and put in a different electrolyte and start over again.

Trial Examiner Norwood: Are the other products different from that?

The Witness: Very different.

Now, take the National oxide, you have to mix it with acid to start with. If you put acid and water together, you have got a heating action, and it takes about thirty minutes to mix the oxide. Then that plate cannot be used for two or there days.

In the forming room you have to charge the battery with one particular kind of acid, the battery has to be cleaned out, dumped and refilled with another acid for the final charge.

By Mr. Wood:

Q. Do the National salesmen say that their oxides are better than Eagle-Picher's?

3623 A. Well, as time goes on, one company will be ahead for a while, the other company will take a big stride and be ahead of the other.

Q. At the present time, whose oxides do you prefer?

A. I prefer Eagle-Picher's.

Q. Have you ever had any technical assistance from members of the Eagle-Picher organization?

A. A lot.

Q. What has been the nature of it?

A. Well, they have developed first a plate dryer for us, a processor. When plates were pasted they had to be handled individually and put into ovens and cooked overnight, and then taken out of these trays and stacked. They developed a machine that is connected into the pasting machine, and that is all done automatically. The plates come right straight through and can be immediately stacked, which saves a lot of labor.

Q. Has that helped your company?

A. Yes, that particular machine saves us several hundred dollars a month.

Q. What other services, if any, has Eagle-Picher performed for you, services of a technical nature?

A. They run a constant testing for us on batteries. We send our batteries down there periodically for all different kinds of tests and ways to improve the batteries. We also send other material down, too.

3624 Q. Does your company maintain a research department of its own?

A. No.

Q. Why not?

A. Well, we can get that from Eagle-Picher, so we don't see any reason to pay for one ourselves.

Q. Are you in competition with any of the larger battery companies?

A. We are in national competition with everybody that make batteries.

Q. Are you in competition with Willard, Exide, Electric Auto-Lite, and companies of that general type?

A. Yes.

Q. Do you know whether or not those companies have research organizations?

A. I naturally assume that they all have research laboratories. I don't know the extent of them.

Mr. Wright: I move the answer be stricken, Your Honor. It isn't based on the witness' own knowledge, but is an assumption.

Trial Examiner Norwood: Motion allowed.

By Mr. Wood:

Q. Does the technical service supplied to you by Eagle-Picher assist you in competing with the larger battery manufacturers?

3625 A. Very much so.

Trial Examiner Norwood: What is your matter of pricing?

The Witness: Retail-wise, while we have no retail price we have a suggested retail price varing from $20 to $30.

By Mr. Wood:

Q. Now back to 1936, did both National and Eagle-Picher solicit your business?

A. Yes.

Q. Did they each offer you technical service?

A. No.

Q. Which one did not?

A. Eagle-Picher offered us and National didn't.

Q. Does National now offer technical service?

A. Yes. I don't think it is of the same type, or as extensive, because it is a different part of the country.

Q. What men in the Eagle-Picher Company have given you the technical service to which you refer?

A. Mr. Chubb, mainly; Mr. Briggs and Mr. Harner, three of them.

Q. Have you ever visited the Eagle-Picher laboratory at Joplin?

A. Yes.

Mr. Wood: Mr. Welch has one question to ask the

3626 witness.

By Mr. Welch:

Q. Mr. Mitchell, does Sherwin-Williams ever try to sell you battery oxides?

A. No.

Mr. Welch: That is all.

Mr. Wood: You may cross-examine.

Trial Examiner Norwood: Cross-Examine.

Cross-Examination by Mr. Wright.

Q. Where or over what geographical area principally do you sell your batteries, Mr. Mitchell, and I am talking now of the Kansas City plant.

A. Arkansas, Oklahoma, Missouri, Kansas, Iowa and Nebraska.

Q. What is your principal distribution area from your St. Paul plant?

A. In the neighboring States, including Minnesota, North and South Dakota, and the northern part of Iowa and Nebraska.

Q. Did you acquire both of these plants at the same time, or vice versa?

A. No, we acquired the Kansas City plant in 1936, and the other plant was acquired about a year ago.

Q. Now, back in 1936 when you started the Kansas City plant, you stated that you purchased on a truckload basis from Eagle-Picher. Is that correct?

3627 A. That is right.

Q. Is that the five-ton price that you are referring to?

A. Yes.

Q. That is generally higher than the carload price, is it not?

A. Yes, I think it is a little higher.

Q. When did your purchase become such that you were eligible for a carload price, from the point of time?

A. As I remember, it was in about 1937 or '38. I cannot remember the exact date.

Q. Did you find it to be any competitive advantage to you to be able to qualify for that lower price in carload purchase?

A. Always with any saving you are naturally that much better off.

Q. Back in that period of time from '36 to '38, what was the competitive situation on batteries as to prices?

A. You mean the battery prices themselves?

Q. Yes, of your competitors, the prices that you had to sell at?

A. Well, our principal trouble then was not so much the matter of price as it was selling the customers. Since we were an unknown company, we had the problem of merchandising. That was our principal trouble back in those days rather than price.

Q. In those days, was it not true that there were 3628 some batteries in the market at extremely low retail prices?

A. That is right.

Q. Sears-Roebuck, Montgomery Ward?

A. Yes.

Q. Did you encounter competition from Bowers Battery Company in that area?

A. Bowers sold in that area for about a year, but I have forgotten what year it was—1940 or '39.

Q. Is Grant Storage Battery Company of Minneapolis a competitor?

A. Yes, they operate through our same territory.

Q. In that period of '36 to '39, what were the price ranges of Grant? Were they low or high in comparison with the average?

A. I would say that on certain types of accounts they were high, and on certain types of accounts they were low.

Q. Can you explain that?

A. Well, batteries are normally sold with list, dealer and job prices, the three schedules. Grant had a price lower than the dealer but higher than the jobber. Where certain other companies will operate between jobber and dealer, they went about half way in between with a one-price deal.

Q. Did you find it necessary in that period of time when you first started, say from '36 to '40, to manufacture and sell a light, cheap battery at a low price?

3629— A. Yes.

Q. What kind of a battery was that?

A. Well, that is the way you describe it, a light cheap battery.

Q. What competition forced that?

A. Everybody, including ourselves. You know the old cycle where everybody forces the other person to do it.

Q. It was on a price basis that you were forced to do that?

A. Yes.

Q. What was your margin of profit on that battery in that period of time?

A. I don't remember the exact margin on it, but it was practically nothing, or maybe a loss. I don't remember the exact profit, but it was the same as no profit at all.

Q. Back in that time, was a matter of saving five to ten cents on the material cost of the battery of any importance to you?

A. No. Our principal trouble in those days was not a matter of price as much as it was a matter of selling the

people on the idea that we had a good product and knew how to make a good product.

Q. Did the prices which you set on your battery have any relation to that?

A. Well, this particular battery, this light, cheap battery we mentioned—of course our idea was, and
3630 everybody else's was, to hold that sale to a very minimum. We only sold a few of those. They were referred to as price leaders.

Of course if we made all our batteries that way, we would have gone broke, but we kept down to a small percentage of them.

Mr. Wright: I have no further questions.

Mr. Wood: Nothing further.

Trial Examiner Norwood: Thank you, Mr. Mitchell. (Witness excused.)

Mr. Wood: May we go off the record?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

We will recess until 10 o'clock tomorrow morning.

(Thereupon, at 11:40 o'clock a. m., the hearing was recessed until 10 o'clock a. m., Thursday, Septemnber 18, 1947.)

3631

Hearing Room,
Federal Trade Commission,
Washington, D. C.,
September 18, 1947.

Met, pursuant to adjournment, at 10:00 a. m.

Before:

J. W. Norwood, Trial Examiner.

Appearances:

James D. Ewing and E. Z. DuBose, Attorneys for the respondent National Lead Company. (120 Broadway, New York, New York.)

Edmund T. Wood and Richard Serviss, Attorneys for the Respondents Eagle-Picher Lead Company and Eagle-Picher Sales Company. American Building, Cincinnati, Ohio.)

3632-A Henry E. Gardiner, Attorney for the Respondents Anaconda Copper Mining Company and International Smelting & Refining Company. (120 Broadway, New York, New York.)

James T. Welch and Robert Mathis (Davies, Richberg, Busick & Richardson), Attorneys for the Respondent The Sherwin-Williams Company. (815 15th Street, N. W., Washington, D. C.)

Joseph S. Wright and Paul R. Dixon, Attorneys for the Federal Trade Commission.

3632-B PROCEEDINGS

Trial Examiner Norwood: The hearing will come to order.

Pursuant to adjournment of yesterday, the hearing in Docket 5253 is now reconvened in Room 332, Office of the Federal Trade Commission, Washington, D. C., at 10:00 o'clock a. m. on the 18th day of September, 1947.

The appearances are as follows:

Joseph S. Wright appearing for the Federal Trade Commission..

Edmund T. Wood and Richard Serviss appearing for the Eagle-Picher Company and Eagle-Picher Sales Company.

E. Z. DuBose appearing for the National Lead Company.

James D. Ewing, appearing for the National Lead Company.

Call your witness, Mr. Wood.

Mr. Wood: Mr. Bowlby.

J. M. BOWLBY was thereupon called as a witness for the respondents Eagle-Picher Lead Company and Eagle-Picher Sales Company and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Wood:

3633 Q. Will you please state your residence and occupation?

A. I reside in Cincinnati, Ohio, and am president of the Eagle-Picher Company.

Q. How long have you been president of the Eagle-Picher Company?

A. Since September, 1941.

Q. What was your business connection prior to that time?

A. For the preceding 20 years, I had been a member of the partnership of Barrow, Wade, Guthrie & Company.

Q. And what is your business?

A. Certified public accountants.

Q. Did they work for the Eagle-Picher Company under retainer?

A. They were the independent auditors of the Eagle-Picher Company from about 1926.

Q. Can you name some other typical plants of your firm?

A. Yes. Babcock & Wilcox; Island Creek Coal Company; New York, Ontario & Western Railroad Company—a large group of important companies, since the firm was the oldest accounting firm in the United States.

Q. And how many cities in the United States did you have offices, appoximately?

A. I would say 12 or 15.

Q. Will you please tell us what your education was, Mr. Bowlby?

3634 A. I graduated from college as a mechanical engineer and followed that profession for about five years, and I then entered into commercial and investment banking, and during that time attended night school and took a course in accounting and a course in law.

Q. Now, before becoming president of the Eagle-Picher Company, what, if any, was your connection with the Eagle-Picher Company?

A. From 1930 on, I was the partner in direct charge of the accounting work for the Eagle-Picher Company. During the depression I expanded the activities of the Chicago office of Barrow, Wade, Guthrie & Company, of which I was then senior partner, into the industrial management field, and commencing with 1936 I served the Eagle-Picher Company as a management consultant.

Q. Now, as management consultant to Eagle-Picher, did you at any time make a survey of the company's business?

A. Yes, I made a survey, a very extensive survey in 1936 and 1937.

Q. Did you make any recommendations to the company?

A. Yes, quite a number.

Q. Were they followed by the company?

A. To a degree at the time, not in full.

Q. What in general were the recommendations which the company followed?

3635 A. Oh, probably the principal one was the establishment of the divisional form of organization and operation which has obtained in the company from July 1, 1937, down to the present time.

Q. Will you please explain what you mean by the divisional form of organization?

A. Prior to the inauguration of that form of organization, the company had had one general sales manager who handled the selling staff which sold all of the products of the company, and they had one principal production man; whereas under the divisional form of organization, the division was integrated from top to bottom, and the divisional manager handled both the production and sale of the specific products segregated in the respective divisions.

Q. What are the present divisions of your company?

A. We have the pigment division, the white lead division, the metal division, the metal products division, and the insulation or home conditioning division.

Q. And who are the heads of those divisions at the present time?

A. Mr. Zoller is general manager of the pigment division; Mr. Hayt of the white lead division; Mr. Murdock of the metal products division, and Mr. Carter of the insulation division.

Q. What are your duties and responsibilities as 3636 president of the Eagle-Picher Company?

A. Well, just the normal duties that inure to an

office of chief executive of a company of our size and breadth of activity.

Q. Do you attempt to run any of those divisions individually?

A. Oh, no.

Q. Are you familiar with the general policy in those divisions?

A. Yes.

Q. Now, at the time you made the survey for the company which led to the changes of July 1, 1937, did you familarize yourself with the competitive policy of the company to the extent necessary for that survey?

A. I did.

Q. And when you became president of the company in September, 1941, did you further familiarize yourself with competitive policies?

A. I have, since becoming president, kept myself informed on competitive policies of the various divisions.

Q. What was your purpose in familiarizing yourself with those policies?

A. Something that is obviously necessary to an understanding of the business and the establishment of other general policies which are dependent upon the competitive position of the company.

3637 Q. Now, did you at any time find any agreements or understandings between your company and National Lead Company, or any of the other companies engaged in the sale of lead pigments, affecting prices or terms or conditions of sale?

A. No, I never found any such agreements.

Q. At the time you became president of the company, were you concerned in any respect as to whether such agreements existed or not?

A. No, I don't believe it ever crossed my mind that such agreements might exist.

Q. If you had found any such agreements, what would have been your policy in respect to them?

A. Well, I certainly would have looked into their propriety, and if I had found that there were any improper agreements of that nature in existence, I would have taken the necessary steps to terminate them.

Q. Were you particularly conscious at that time of the activity of the anti-trust division of the Department of Justice?

Mr. Wright: Objection, Your Honor. I don't see that that has any relevancy in this matter.

Trial Examiner Norwood: Well, I think that is a leading question.

Mr. Wood: I think it is a proper question, because Thurman Arnold's campaign was at its height at that
3638 time, and every executive in the country was feeling very responsible as to his position in regard to the anti-trust laws; everybody was.

Trial Examiner Norwood: What time was that?

Mr. Wood: September, 1941.

Mr. Wright: Counsel has supplied the answer that he hoped to get from that very leading question.

Trial Examiner Norwood: I think it is a leading question, but I think he may bring out the fact that he kept up with the law and the conditions respecting trade agreements, and so forth.

Mr. Wright: Your Honor, I am not objecting so much because of the fact that it is leading, but it is an absolutely irrelevant matter. Knowledge has no part in this proceeding. The fact that the Sherman Act is on the statute books and has been since 1890 is a well known fact to everyone connected with the business.

Mr. Wood: As president of the respondent corporation, I think the witness should have the greatest freedom in testifying to his own state of mind.

Trial Examiner Norwood: I think they have been allowed in all these cases to state their mental attitude toward this situation. I will overrule the objection. Let him answer.

Mr. Wood: Will you read the question to the wit-
3639 ness, please?

(The pending question was read by the reporter.)

A. Yes, I was.

By Mr. Wood:

Q. Now, what is the general competitive problem of the Eagle-Picher Company?

A. The Eagle-Picher Company is not a leader in any one of its respective lines. In several instances it is second in the field, and in the case of other products it ranks farther down the scale. But I make the point that not being a leader in any one of the lines, it is not in position to dictate the selling price policy in any of the fields in which it operates. It must follow rather than lead.

Q. In the insulation field, who is your principal competitor?

A. There are many. Johns-Manville is probably the principal one.

Mr. Wright: I object to further questions along the line of insulation, Your Honor, as irrelevant and immaterial to this case.

Mr. Wood: I am not pursuing the matter, Mr. Wright. I am just trying to bring out the fact that there is a general problem of the company in respect to which it has a formulated policy.

Trial Examiner Norwood: I think he wants to give
3640 us a complete picture of this company in throwing light on its various activities.

By Mr. Wood:

Q. Now, who is your principal competitor in the sale of zinc products?

A. New Jersey Zinc Company, with some substantial competition from St. Joseph Lead Company and American Zinc, Lead & Smelting Company.

Q. And who is your principal competitor in the sale of lead pigments?

A. National Lead Company.

Q. And who is your principal competitor in the sale of lead products?

A. National Lead Company and Federated Metals Division of American Smelting & Refining Company.

Q. Is it your company's policy to compete in any of these fields by means of price wars?

A. No.

Q. How would you define a price war?

A. A situation in which competing companies are constantly lowering prices to gain a larger segment of the available business.

Q. Now, if the second largest company in a given field commences a price war, what is the probable result, in your opinion?

3641 A. It will lose money and ultimately the more strongly entrenched company will win out in the war.

Q. If you lower a price below your competitor's price, how long is that competitive advantage likely to last?

A. Not any longer than it takes the competitor to lower his price below ours.

Q. Does your company compete with the National Lead Company in the sale of lead pigments?

A. It does.

Q. How does it do it?

A. By endeavoring to maintain a higher quality in its products and to give services to its customers over and beyond that given by its major competitors.

Q. If your company does have superiority of product in this respect to a competitor, is that an advantage to your company?

A. Obviously.

Q. Why, in spite of the fact that you said "obviously"?

The Witness: Will you read the previous question?

Trial Examiner Norwood: Will you read the question?

(The question was read by the reporter.)

The Witness: A superior product available at the same price will sell more readily than the inferior product available at that price.

By Mr. Wood:

Q. Can your competitor match that product, necessarily?

3642 A. Not necessarily.

Q. Has your company engaged in any research activities?

A. Yes, we have very extensive research facilities, both local plant facilities and central research activities.

Q. What if any is the relationship between your research activities and your competitive policy?

A. One of the major objectives of the reseach organization is to strive constantly to improve our products and to work with our customers in producing a product that will meet their requirements or will enable them to improve their products through the use of our products.

Q. Has your company engaged in any institutional advertising?

A. Yes. That is one of the things that I have done since I became president of the company, inaugurated a program of institutional advertising.

Q. What is the general scope of that program, or I had better say, what has been the general scope of that program?

A. It has varied from year to year as to the media employed, but its principal purpose has been to acquaint the business of financial community with the Eagle-Picher group of companies, their financial strength and stability, and incidently, with the products which Eagle-Picher manufactures and which by reason of their limited consumer use are very frequently unknown to the general public.

3643 Q. In what magazines have you advertised, in gen-

A. Time, News Week, Collier's, Wall Street Journal, Chicago Journal of Commerce.

Q. Is it your opinion that that type of advertising has any effect on customer acceptance of your products?

A. I think it has a very material effect.

Q. Is that type of advertising intended to increase your business in local areas or nationally?

A. Nationally.

Q. Is it the policy of your company to compete on a national basis?

A. Yes.

Q. Did you read the testimony which Mr. Goetz and Mr. Harner and Mr. Chubb gave before the Commission in July?

A. I have read Mr. Goetz's and Mr. Harner's testimony. I do not recall that I read Mr. Chubb's.

Q. Does their testimony represent the type of service and help which it is your policy to give the customer?

Mr. Wright: Objection, Your Honor. If this witness is going to testify as to the type of activities that counsel is referring to in this question, he should testify to them directly himself rather than by adoption of another witness' testimony when he has not even been in the room when it was given.

Trial Examiner Norwood: I think it would save a 3644 great deal of time to let him adopt it. But if you object to it, I think that that would be covering too much ground in one question and answer.

Mr. Wood: Mr. Bowlby, as president of the company, is not familiar with all of the details to which those men testified. Now, I did not ask him whether their testimony was true. I asked him whether or not those activities represented the policy of the company which was his purpose.

Mr. Wright: Now, I do not have off hand a recollection of all the activities that those three gentlemen described in that testimony. And I certainly cannot let such a question go by without objection and without having an opportunity of examining that testimony again.

Trial Examiner Norwood: If he is going to adopt the details, I think that would not be admissible at all. If he is going to adopt the general policy which this testimony reflects—

Mr. Wood: That is my point.

Trial Examiner Norwood: That is too much of an opinion. I think it will not take him long to tell us what their general policy is, and I think it is more satisfactory, in the face of an objection.

I think I shall have to exclude it.

Mr. Wood: I think he has testified previously that their policy was to give service, and that that has been
3645 adequately covered by his previous answers.

Trial Examiner Norwood: The testimony of these witnesses and what it reflects already appears in the record, you see. If he wants to add anything to it, I think he can do so especially, you see.

I will sustain the objection.

By Mr. Wood:

Q. Now, what, as you understand it, is your company's general policy in respect to the pricing policy of lead pigments?

A. In general we maintain a differential over and above the price of the basic raw material, that differential varying as between different products.

Q. On a lead pigment such as basic lead carbonate or lead oxide, what determines your company's exact price at any given time?

A. Primarily the price at which the product is obtainable from competition.

Q. What is your pricing policy on products such as leaded zinc, basic lead sulphate, and blue lead?

A. To the best of my knowledge, the same policy maintains in respect to those products.

Q. Are those products made just the same way as the oxides and the basic carbonate?

A. I could not tell you.

Q. What is the opinion of the management of your
3646 company as to the future of the business of manufacturing and selling basic lead carbonate in oil?

Mr. Wright: Objection, Your Honor. I do not think that that is a relevant matter to this proceeding. It requires hearsay, in the second place.

Trial Examiner Norwood: Will you read the question?

(The pending question was read by the reporter.)

Trial Examiner Norwood: I think that he can tell us what his opinion is, if it is relevant, and that is in part of that question.

Mr. Wright: Your Honor, what possible relevance does

that have with respect to whether they are discriminating in price?

Mr. Wood: I think the purpose and the policy of the company is always a relevant matter in a case of this type.

Mr. Wright: Now, this is not the purpose or the policy of the company at the time we alleged these discriminations or conspiracies began. This is a projection into the future, which is admittedly quite some time after the initiation—

Trial Examiner Norwood: It is not required as an explanation of the present or past action, and I think I shall have to sustain that objection.

3647 Mr. Wood: Then I will ask the question differently, and put it this way:

By Mr. Wood:

Q. At the time you made your survey for Eagle-Picher in 1936 and 1937, what was your estimate of the position and futnre of the business of manufacturing and selling white lead carbonate in oil?

A. At that time the use of white lead carbonate in oil—that is in the paste form—seemed to be on the decline.

Q. Has your company ever considered giving up the business entirely?

Mr. Wright: Objection, Your Honor. What relevancy can that have to this proceeding?

Mr. Wood: I think it is rather important to show the company's general attitude.

Mr. Wright: Well, there again what has their general attitude on whether or not they had ever considered staying in the business or leaving it got to do with the specific acts which are charged in this complaint?

Mr. Wood: Well, I do not wish to be accused again of putting words in the witness' mouth by arguing an objection.

I think from the point of view of the testimony yesterday, and the testimony that has been in this case with respect to competition between lead in oil on the one hand and mixed paint on the other, which we conceive to be a

3648 very important matter in this case, I think that issue in the case clearly makes this testimony relevant.

Trial Examiner Norwood: How are you going to connect this up with any of the issues as to what his view was? I can see how it might be of value in explaining some of his actions here, but I think I would ask him about the actions and ask him the reason for them.

Just bringing out the view unconnected I think is objectionable, and I shall sustain that objection.

Mr. Wood: I will go at the subject matter differently still and I will ask the witness whether or not his company manufactures and sells any paints?

The Witness: The company does, through its divisions, subsidiaries and affiliates.

By Mr. Wood:

Q. Is your company at the present time competing in the mixed paint field?

A. To a relatively minor degree.

Q. Has your company made any effort to assist mixed paint manufacturers who bought lead pigments from you?

A. Yes, we have worked with those manufacturers on paint formulations to enable them to improve their products, and expand their volume of business, and thereby obtaining increased sales of our products or the introduction of new products manufactured by us.

3649 Q. Is there competition between mixed paints and white lead in oil?

A. Read the first part of that—is there competition?

Trial Examiner Norwood: Read the question.

(The pending question was read by the reporter.)

The Witness: There is.

By Mr. Wood:

Q. And from the point of view of your company policy, where have your placed your emphasis?

A. Up to the present time, emphasis has been placed on white lead and oil in a finished form, our RTU.

Q. And in what division has that been?

A. It is in the white lead division.

Q. And does that compete with the products manufactured by the pigments division and sold by Mr. Voller's division?

A. Yes, it does.

Q. What in your opinion is the relative importance of the white lead paste in comparison with the RTU?

A. You mean from a volume standpoint in the company's sales?

Q. From the point of view of your future business, as you see it.

Mr Wright: Objection, Your Honor.

By Mr. Wood:

Q. Your future prospects?

Mr. Wright: Objection, Your Honor, on the ground
3650 of relevancy again. I don't see what the future prospects as between two of these lead pigments have to do with the issues that we have at hand.

Mr. Wood: I am perfectly aware that all through this case there has been a great deal of testimony by practically every witness in the case, whether called by the Commission or called by the respondents, that is not directly linked to the most technical aspects of the issues of the case. A great deal is background testimony which we want in the record to give the Federal Trade Commissioners a picture of the industry as a whole, because they are charged with the responsibility of acting in the general public interest, and I do not think that all testimony should be excluded simply because you cannot tie it in closely with the technical aspect of an issue.

Mr. Wright: By counsellor's definition there, any executive or management problem of the Eagle-Picher Company would be relevant and admissible here in this testimony. It has no possibility of connection with the issues in the case. This does not relate to what was in the minds of the people when the system that we are talking about now was established; this is a question that relates to the mind of the man in 1947, his projection for the future.

Trial Examiner Norwood: Well, there are some rather
intricate economic questions in this case, and probably
3651 we should admit some evidence here that would be considered not on the issues at all, but afterward, as to the remedy.

We have been inclined when we get the president of a company on the stand, and the company is a respondent, to resolve the doubt in his favor and let him tell us the story about his company. We have always done that through all the anti-trust cases, so unless there is any real positive harm to be done by it, I think that counsel should agree to let these matters in as to what his attitude is.

Mr. Wright: Well, Your Honor, my objection is based on the primary objection of all irrelevant matters, since all it does is serve to confuse possibly someone who may not be familiar with the issues involved as to the record in the case. Furthermore, it burdens the record with a mass of material that may be interesting from the point of view

of management of the Eagle-Picher Company, but has nothing to do with this case.

Trial Examiner Norwood: Well, I think that counsel has stated the principal about that, but where these details here appear where the information may be of some probable value, even tho gh it does not apply directly to the issues, I am inclined to resolve the doubt in the company's favor in the matter of letting him tell the whole story of his own business.

I will overrule that objection subject to striking this material if it appears injuriously irrelevant.

3652 Mr. Wood: Will you read the question to the witness, please?

(The pending question was read by the reporter.)

A. I anticipate that the RTU business will be much larger and more attractive than the paste segment of the business.

Mr. Wood: May we have a five-minute recess, Your Honor? I think I am through with the direct examination of this witness, but I want a chance to talk with Mr. Serviss.

Trial Examiner Norwood: We will take a five-minute recess.

(A short recess was taken.)

Trial Examiner Norwood: We will resume. You may proceed, Mr. Wood.

Mr. Wood: You may cross-examine, Mr. Wright.

Cross-Examination by Mr. Wright.

Q. Where are the main offices of Barrow, Wade & Guthrie?

A. The head office?

Q. Yes, sir.

A. New York.

Q. New York. Is that where you maintain your offices as the senior partner in that firm?

A. No; I was senior partner in charge of the Chicago office.

Q. In Chicago?

A. Yes.

3653 Q. How long did you maintain your residence there?

A. From 1922 until 1941, when I went to Cincinnati.

Q. What is this product RTU that you referred to?

A. It is white lead in a ready to use form.

Q. How does that differ from the paste white lead?

A. Paste white lead has only a limited amount of linseed oil added, whereas the RTU, as I understand it, has the full amount of oil and dryers, and any other elements that enter into the finished paint product, so that it is ready to be applied without any further change.

Trial Examiner Norwood: Well, that makes it ready-mixed paint, does it not?

The Witness: Yes, sir.

Trial Examiner Norwood: What is the difference?

The Witness: Except that the RTU is only the white lead itself and it is not made in colors.

Trial Examiner Norwood: I see.

By Mr. Wright:

Q. That is a straight basic carbonate white lead pigment, then, is it?

A. That is correct.

Q. Does the Eagle-Picher Company do any substantial business in the marketing and sale of aggregates and tailings from its operations?

Trial Examiner Norwood: Will you read that 3654 question?

(The pending question was read by the reporter.)

Mr. Wood: I really have no objection to the witness' answering the question, but I feel that I should object on the score of relevancy.

Mr. Wright: Your Honor, I objected originally to testimony about their business in insulating materials and so forth, and I assure you that this will be connected up.

Trial Examiner Norwood: Objection overruled.

A. Yes, we sell the residue from our milling operations, which is customarily known as chats, or tailings.

By Mr. Wright:

Q. What are those products used for, Mr. Bowlby?

A. For railroad ballast and the topping of roads air strips, exhibition grounds, or anything of that kind.

Q. Those are all produced down in your lead producing fields; is that correct?

A. In the tri-state field.

Q. Over what areas do you market those products?

A. They go over a substantial area, because they are sold largely to railroads. However, delivery is made in the immediate vicinity to the connecting road.

Q. And the customer transports it wherever he wishes to use it; is that correct?

A. That is correct.

3655 Q. You sell it, then, f. o. b. at the point of pro-

A. Yes, sir.

Q. Do you attempt to make sales of that product on the eastern seaboard?

A. Not to the best of my knowledge.

Q. On the Pacific Coast?

A. No.

Q. Why don't you seek a national distribution of that product?

A. Because there is an ample outlet among the roads serving the territory where it is produced.

Q. Is that product in competition with aggregates and gravel and other materials used for ballast, such as cinders?

A. I cannot answer that definitely. I assume that it is.

Q. Approximately what is the price per ton at which that product is sold?

Mr. Wood: May it please the examiner, I object to the indefinite continuation of this line of questioning, because it has nothing to do with the issues of the case.

Mr. Wright: Your Honor, I can only assure counsel and yourself that I will attempt to connect this matter up.

Trial Examiner Norwood: This is cross-examination. He may be testing him as to his knowledge of this business.

Mr. Wood: There is no lead pigment involved in any respect.

3656 Trial Examiner Norwood: Objection overruled. Do you want the question read?

The Witness: If you please, Your Honor.

Trial Examiner Norwood: Will you read the question?

(The pending question was read by the reporter.)

A. I do not know.

By Mr. Wright:

Q. Can you state from your experience with the company whether it would be substantially less on a tonnage basis than, for instance, litharge, or red lead?

A. Oh, yes, it is much lower than litharge or red lead, because it is a waste product. I do know that the price varies according to the work that is necessary in cleaning and screening the product.

Q. Would transportation costs on shipping that material any great distance, say, from Joplin to San Francisco, amount to as much as the customary price at which you sell the product?

Mr. Wood: I object to the question as indefinite—"would amount to as much".

Mr. Wright: "As much or more", the question stated.

Mr. Wood: I am sorry. I did not understand it that way.

Trial Examiner Norwood: Is the objection withdrawn?

Mr. Wood: If I understand the question correctly,

3657 I am perfectly willing to have the question asked.

As I understand the question, you asked whether the cost of the freight to San Francisco would be as great as the cost of the product at Joplin; is that it?

Mr. Wright: That is it.

Mr. Wood: He can ask that.

Trial Examiner Norwood: Very well.

A. I would make the assumption that it would be more.

By Mr. Wright:

Q. Is it the policy of the company to seek national distribution on that chat or tailings?

A. No.

Q. Would it be fair to state that the cost of transporting the article from Joplin in the tri-state area would prevent national distribution of the product?

A. Yes, it would probably be fair to make that statement.

Q. Br. Bowlby, you were testifying about the efforts of the Eagle-Picher Company to improve the quality and to obtain quality advantages over competition on these various lead pigments.

From your experience, is it not logical to assume that any marked quality advantage of one product over another would ultimately reflect itself in selling price?

A. No, I would say that hat does not necessarily follow.

Q. What are the alternatives to that?

3658 A. The maintenance of the differential between that product and competitive products.

Q. The quality differential at the same price?

A. Yes.

Q. Is it not fair to assume that over a period of time, that quality differential would become so widely known that the inferior product could not be sold at the same price?

A. No, not necessarily. The inferior product may have ample demand for embodiment in that end product where the highest quality is not required.

Q. Now, let us take a battery of litharge, for instance.
A. Yes.
Q. Assuming that your company could develope a battery of litharge which is superior in many respects to that of the competition on the market—and that is a real superiority now, referred to—is it not logical to assume that the trade becoming aware of those advantages will divert business from the inferior product sold at the same price over a period of time?
A. Yes, for the production of an end use product that required that high degree of refinement.
Q. Your answer was yes, then?
A. With those qualifications.
Mr. Wright: No further cross-examination.
Mr. Wood: I have no redirect.
3659 Trial Examiner Norwood: Are there any further questions?
Mr. Wood: No further questions.
Trial Examiner Norwood: Thank you, Mr. Bowlby. (Witness excused.)
Mr. Wood: We have one more witness, Mr. Hayt, and his testimony will be rather brief. At the end of his testimony, we will have to discuss what we are going to do next, which is primarily up to Mr. Welch. I suggest that we meet at 2 o'clock.
Trial Examiner Norwood: You would rather defer calling this witness until 2 o'clock?
Mr. Wood: I understand the witness is leaving at 3:45.
Trial Examiner Norwood: We can examine this witness, and go along here for a half hour or more, and then we can reconvene at 2 o'clock to discuss the future arrangements.
Mr. Wood: Mr. Hayt, will you take the stand, please?

W. H. HAYT. was thereupon called as a witness for the respondents Eagle-Picher Company and Eagle-Picher Sales Company and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Wood.

3660 Q. You are the Mr. Hayt who testified previously in this case?
A. Yes.
Q. And you are employed by Eagle-Picher?
A. Yes.

Q. As manager of the lead in oil division, is that correct?

A. The white lead division.

Q. How long have you been employed by the Eagle-Picher Company?

A. The Eagle-Picher Company and its predecessor, about 33 years.

Q. What have been your duties with the company during the period of your employment?

A. Originally I was a salesman, then a branch manager, then assisant manager in the pigments division, and later a division salesmanager, and then a division manager.

Q. How long have you been head of the white lead department?

A. Since July 1, 1937.

Q. At the time you became head of that department, were there any understandings with National Lead Company or any other competitors with respect to the prices or the terms and conditions of sale of white lead?

Mr. Wright: I object to that question, Your Honor. It calls for facts that may be without this witness' knowledge.

It did not require an answer as to whether he himself 3661 knew of any such understandings.

Mr. Wood: May I have the question read, please?

(The pending question was read by the reporter.)

Trial Examiner Norwood: He can only testify as to what came to his knowledge. I don't think he can testify generally as to what everybody in the company did.

Mr. Wood: Well, I will put it this way—

Trial Examiner Norwood: The objection is sustained on that.

By Mr. Wood:

Q. At the time you became head of the white lead department of the Eagle-Picher Company on July 1, 1937, would you have known about any agreements or other understandings with National Lead Company or any of your other competitors in the sale of white lead in respect to prices or terms and conditions of sale?

Mr. Wright: I object to that, Your Honor. The question is would he have known.

Trial Examiner Norwood: I think you had better ask him what he does know, what he did know or what came to his attention.

Mr. Wood: The man became head of the department at

that time, and there could not have been understandings without his knowledge.

Mr. Wright: That is counsel's conclusion.

3662 Mr. Wood: Will you read my last question?

Trial Examiner Norwood: I think you should direct the question to his knowledge, and then the circumstances which would indicate that if there were any such thing, he would know about it.

I will sustain the objection to the question in its present form.

By Mr. Wood:

Q. To your knowledge, were there any agreements between your company and the National Lead Company, or any other competitors in the sale of basic lead carbonate in oil on July 1, 1937, or thereafter with respect to prices or terms and conditions of sale?

Trial Examiner Norwood: Answer the question.

A. There were none that I knew of, and none that I heard of subsequently.

By Mr. Wood:

Q. Now, Mr. Bowlby mentioned a product manufactured by your company called RTU. Can you explain in a little more detail just what the nature and purpose of that product is?

A. Well, white lead in oil in paste form is an inconvenient product to use in that it is a semi-finished product, and requires further processing. Although it is in direct competition with mixed pigment paints, the mixed pigment paints reach the user in a form ready to use,

3663 whereas it requires both skill and time to prepare the white lead in oil for use.

We felt that that was largely responsible for the decreasing use of the product, and therefore wanted to put it in a form that was more readily acceptable to the consumer, which would save him time and eliminate the necessity for skill.

Mr. Wood: Will you mark this for identification, please, as Respondent's Exhibit 196.

(The document referred to was thereupon marked Respondent's Exhibit 196 for Identification.)

By Mr. Wood:

Q. I hand you a document which has been marked for identification as Respondent's Exhibit 196, and ask you if you can state what this document is?

A. That document is an advertisement for Eagle RTU white lead paint and some additional reference to Eagle white lead in oil.

Q. You said the document was an advertisement. I notice at the bottom of the document, "This advertisement will appear in Better Homes and Gardens, April, 1946; American Home, April, 1946."

Is the document an advertisement from a magazine, or a sample of an advertisement that appeared in a magazine?

A. It is a reprint or preprint of the advertisement as it was about to appear.

Q. And did the advertisement so appear?

3664 A. I presume so.

Q. Did your company put out other advertising of generally like nature?

A. Yes, considerable.

Mr. Wood: I offer the document into evidence.

Mr. Wright: Your Honor, I am going to object to this on the ground of relevancy and competency. On its face it has no relevancy to the case. It is incompetent for any purpose that I can conceive of at this point, since it is a proof of an advertisement about which the witness doesn't know anything. He doesn't know whether it was actually run or not.

Trial Examiner Norwood: That is a point well taken.

Mr. Wright: It is a document which he doesn't appear to have had anything to do with the preparation of.

Trial Examiner Norwood: That point is well taken. He has not said it appeared anywhere, but I would admit if to show what the respondent actually represented to the public if there is anything in there that appears to bear on the nature of the competition.

Mr. Wright: Your Honor, assuming now that that is an advertisement that appeared, it appeared subsequent to the date of issuance of the amended complaint.

Trial Examiner Norwood: Objection sustained.

By Mr. Wood:

Q. When did you put RTU on the market?

3665 A. It was first put on the market in 1940, I believe, for a short period, and then with the restrictions on the use of linseed oil that came in late '41, I believe, after a short experimental period it was withdrawn, and then subsequently replaced on the market in 1945.

Q. When in 1945?

A. Early, probably February or March.

Q. And did your company advertise RTU during 1945?

A. I cannot say definitely when the advertising program on RTU started, but probably late in '45.

Q. Do you authorize the advertising put out by your department?

A. The advertising is provided for through a central advertising department which handles the advertising for all divisions, but the division's appropriation for advertising is prepared under my supervision, and all advertising copy is submitted to me for approval and relief.

Q. Was this particular advertising copy ever submitted to you for approval and release?

A. Yes.

Q. And I am referring to Respondent's Exhibit 196.

A. Yes.

Q. And was the publication of this advertising authorized by you?

A. Yes.

3666 Q. Have you ever seen a replica of this advertisement, Respondent's Exhibit 196, appear in any magazine of national circulation?

A. If I have not seen that particular one, I have seen numerous ones substantially the same.

Mr. Wood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: I will sustain the objection subject to some further agreement between counsel about the matter.

Mr. Wright: Your Honor, I am going to move to strike all the testimony relating to the identification of this exhibit which referred to the contents of same and to counsel's statement which read into the record the contents of same.

Trial Examiner Norwood: Well, I think the record should show all this. I will deny that motion.

By Mr. Wood:

Q. Mr. Hayt, in the sale of your white lead in oil paint, what has been your pricing policy?

A. Well, generally speaking it has been our endeavor to set prices on cost plus a reasonable margin of profit, but in actual practice the limiting factor was prices obtained by our competitors.

Q. And what competitors do you have in mind?

A. Well, the National Lead Company, Anaconda, 3667 Glidden, Sherwin-Williams.

Q. In general, have you changed price when the National Lead Company changed price?

A. Yes.

Q. How did you know of their price changes?

A. The information comes in very rapidly from our salesmen and sales offices just as soon as the price changes are announced.

Q. Have you always followed the National Lead Company in changing price on white lead paste?

A. Do you mean following them exactly as to the amount of the change?

Q. Yes.

A. No, we have not.

Q. Have you invariably made a change when the National went up in price?

A. I think generally when National has gone up that we have gone up to some extent.

Q. But not necessarily the same amount?

A. Yes, sir.

Q. Now, in respect to your product, RTU, how do you price that product?

A. On the same basis as I described for white lead in oil; that is to say, cost plus a reasonable margin of profit. But there the limiting factor is the competition from the 3668 highest grade ready-mixed paints.

Q. Does National have a product on the market that is comparable to RTU?

A. Not at the present time.

Q. In pricing RTU, do you follow the prices of National?

A. You cannot, if they do not have a product on the market.

Q. I am sorry.

In general, how does the price of RTU compare with the price of a good quality mixed pigment paint?

A. It is considerably higher.

Q. Does your company manufacture and sell a product called basic white lead sulphate?

A. Yes.

Q. Is that in your division?

A. No.

Q. Do you know to whom, in general, that is, what class of trade, your company sells that product?

A. Almost exclusively to paint manufacturers.

Q. The products of those customers are in competition with your RTU?

A. Directly.

Q. Now, in your advertising and merchandising, what is the emphasis between RTU and white lead in oil respectively?

Mr. Wright: I am going to object to that question, unless the time is specified on that, Your Honor. I do
3669 not think it is admissible to talk about such matters subsequent to the complaint.

By Mr. Wood:

Q. You may limit your question to—what is the date of the amended complaint? May, 1946?

Mr. Wright: I am going to take objection to any testimony later than the date of the original complaint in 1943, unless it can be connected up with practices and made relevant to practices prior to that time, because the issues as to the white leads here were drawn at that time.

Mr. Ewing: But there was an amended complaint which superseded the first one, and you certainly cannot limit it to the date of the original complaint under those circumstances.

Trial Examiner Norwood: No.

The fact being, as you bring out, that certain changes were made in the entire matter after the complaint was made, it would probably be considered in connection with the original.

I will overrule the objection to any relevant evidence prior to the date of the amended complaint. I will ask counsel to rephrase his question, and that will meet the other objections.

He did do that, did he?

Mr. Wood: I think I did do that. I said "limit your answer to the date of the amended complaint, to a
3670 period prior to the date of the amended complaint, which was May, 1946.

Mr. Wright: I did not so understand counsel. But if that was the question, I have no objection.

Trial Examiner Norwood: You may answer that question.

Do you want the question repeated?

By Mr. Wood:

Q. It was the question as to the relative emphasis your company placed on the products RTU and white lead in oil paste prior to the date in question.

A. Our emphasis has been placed almost entirely on the RTU product. White lead in oil paste is very much in a secondary position.

Q. What was your reason for placing your emphasis as you did?

A. The RTU is a product that is more acceptable to the consumer, because it reaches him in a more readily usable form, and therefore the prospective potential market is much greater, and the possibilities of prolonging the life of white lead as a business were more probable.

Mr. Wright: Your Honor, I am going to move to strike that question and answer and the one immediately preceding it. It calls for an answer based on emphasis, and that is a very strange and indefinite term and could have any one of many different meanings.

3671 Mr. Wood: The witness has made a very clear statement of the company's competitive policy in regard to the materials that are primarily involved in this case, and I think it should stand.

Trial Examiner Norwood: I think that emphasis is sufficiently definite in there. It is very clear what meaning is given to it.

Your motion is denied.

Mr. Wood: Could we have a recess until 1:30?

Trial Examiner Norwood: Is that agreeable?

Mr. Wright: Off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Is that agreeable, to recess until 1:30?

Mr. Wright: Very well.

Mr. Wood: We will recess, then?

Trial Examiner Norwood: We will recess until 1:30.

(Thereupon, at 12:05 p. m., a recess was taken until 1:30 p. m., same day.)

3672 After Recess

1:30 p. m.

Trial Examiner Norwood: Come to order.

Take the stand, Mr. Hayt.

W. H. HAYT resumed the stand and testified further as follows:

Cross-Examination

By Mr. Wright:

Q. Mr. Hayt, you spoke of the relative emphasis on RTU and paste white lead. What do you mean by emphasis?

A. The importance that the products take in our marketing plans.

Q. Well, will you explain that?

A. Originally, of course, there was no RTU in the line. Our only product at that time of that type was the keg lead, and ever since I took over the division in 1937 I felt that the white lead in oil, as such, was a dead duck and that changes should be made to make the product more readily marketable.

Finally I was able to get the company to agree to let me put a product of that type in the line, and having gotten that agreement, naturally I chose in all of our marketing plans, whether it was with the salesmen or in the advertising, to make that the leading product, and the ad-
3673 vertising and sales emphasis was placed on that product.

Q. Now, aside from the addition of more linseed oil and mineral spirits, how does the RTU differ from the paste lead?

A. Well, there is one other important element in there, the dryer which is also added so that it is a finished product in every sense of the word.

Q. That is the only other ingredient that is added aside from the additional spirits or oil?

A. That is right, you have got those three essential items, the oil, the voluble thinner and the dryer.

Q. About how much dryer is contained in each gallon of the RTU?

A. Relatively small, about a pint or half pint.

Q. Now, when was the name adopted for this product by Eagle-Picher?

A. Well, I started using that term shortly after I became head of the division. It was a convenient abbreviation in referring to a ready to use white lead paint. We just gradually condensed that to RTU as an abbreviation, and when we finally came out with the product, that became the official designation.

Q. When was that?

A. Originally I think it was late in 1940, for a temporary period.

Q. For how long a period was that? Did you 3674 cease manufacturing the product for awhile?

We took it off the market when the early wartime shortage developed in linseed oil, which presented manufacturing complications, and then we did not resume marketing it again until 1945.

Q. How do your sales of RTU in dollar volume compare, or did they compare in 1941 with your sales of paste white lead?

Mr. Wood: I object to the dollar volume questions for the simple reason that we do not wish to tell our competition just how well we are doing with the product.

Mr. Wright: The question does not require an answer in figures. It asked for a comparison of dollar volume.

Mr. Wood: Well, I am afraid they could figure it from the answer.

Mr. Wright: I asked about the period in 1941.

Mr. Wood: That is all right for 1941.

Trial Examiner Norwood: Answer the question.

A. Well, 1941 is hardly a fair period for comparison because, as I say, the product was put on the market for a relatively short period, and then withdrawn because of unforeseen raw material complications.

By Mr. Wright:

Q. For how long a period was it on the market at that time?

A. About 90 or 120 days.

Q. So that it really has not been on the market in 3675 any substantial sense until when? 1945?

A. 1945.

Q. At what time in 1945?

A. It was early in the year. I would say February; perhaps March.

Q. In your first year of full marketing back in 1945 and

the early part of 1946, what was your relative volume on paste white lead and RTU?

Mr. Wood: I object to the question as calling for confidential information.

Mr. Wright: I do not see how it possibly can be figured, because we certainly have not gotten the individual figures on paste white lead sales of Eagle-Picher Company in this time. So if it is a proportional basis, how could it be disclosing any figures?

Mr. Wood: I think Mr. Hayt did produce figures back last October.

Mr. Wright: Your Honor, if the respondent is seeking to establish on the record here that this RTU is taking the place of white lead, how can he now come in and object to showing the relative volume of both of these products? It seems to me he has to take one position or the other.

Mr. Wood: I am perfectly willing to have him testify that it is taking place. But I do not wish to give the percentage figures if I can help it.

3676 Mr. Wright: In that event, Your Honor—

Trial Examiner Norwood: You can allow him to cross-examine him on the statement that it is taking place. Will you read the question again?

(The pending question was read by the reporter.)

Trial Examiner Norwood: Objection overruled. Answer the question.

A. I would say that RTU was two to three times in dollar volume the cake lead or paste lead sales.

By Mr. Wright:

Q. Do you have figures on those volumes for that period of time?

A. I do not have them with me. They are available.

Q. They are available from the company?

A. Yes.

Mr. Wood: I might say, I would like to say that we would certainly be willing to show Mr. Wright our books and our figures on that, but we do not want them made public unless it becomes necessary. But if Mr. Wright wishes to examine the figures or have one of the investigators for the Commission examine the figures, we will extend them every courtesy.

Mr. Wright: With that statement of Mr. Wood's, I will

make no further objection to that testimony. Otherwise I intended to make a motion to strike.

3677 Trial Examiner Norwood: All right, sir.

By Mr. Wright:

Q. Mr. Hayt, as I understood your direct testimony, it was to the effect that it has been your policy in white lead sales to follow generally the prices, terms and conditions of sale announced by the National Lead Company; is that correct?

A. You mean, follow them at any given time, and make our changes at substantially the same date?

Q. Generally, follow them. Was that your testimony?

A. In the sense that we meet the conditions which they established as to terms of sale.

Q. Now, is white lead in oil the commodity where price chances occur very frequently in normal times of the relatively slow pigment market?

Mr. Wood: The question is objected to as indefinite. What is meant by "normal times"?

Mr. Wright: I withdraw the question to save argument, Mr. Examiner.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

By Mr. Wright:

Q. In your original answer this morning to those questions on direct examination where you say you gen-

3678 erally follow, you had no limitation of time on those answers, did you?

A. I do not know that I understand what you mean as to "limitation of time."

Q. You stated this morning that you generally follow the pricing practices and prices of National Lead Company?

A. Yes, sir.

Q. And you did not mean to limit that in your mind to any period of time, did you?

A. No.

Q. You are speaking now of your whole experience with the company?

A. That is right.

Q. Now, in the period of time from 1937 to 1941, or to the end of 1940, was white lead in oil a commodity on which prices changed very frequently?

A. I do not know what you mean by "frequently". I would say that during that period they probably changed three or four times a year.

Q. When you make a price change on white lead in oil, it affects your whole price structure?

What mechanics do you follow to get that information out to the trade?

A. You mean, in the way of price card announcements?

Q. Yes, sir.

A. We have printed as quickly as possible and
3679 mailed immediately a price card or price change announcement to the trade at large.

Q. You have several types of price cards for several different types of trade, do you not? Or did you have in that period?

A. Two, really.

Q. What classes of trade were those?

A. There is the one that was for the distributor, indicating his cost, and then there were the other three representing the prices to the dealer; that is, the other three were on one card, representing the prices to the dealer, the painter, and the public.

Q. Did you also have price cards or quotations to railroads and industrials?

A. No.

Q. That was not handled by the card?

A. There were generally no announcements sent out to them. They determined the price by sending in inquiries and receiving quotations.

Q. My recollection of your testimony is that you have not always followed National in some cases. They have raised the price, and while you have raised it you have not raised it to the same extent that National has, and that otherwise you have not followed the lead of National in making changes in terms of conditions and prices on white lead.

3680 Is that a correct statement?

A. Yes, sir.

Q. Now did you mean that answer to be limited in time in any way? Do you have any particular period of time which was the basis of that answer?

A. No, that ranges over the period of my experience with the company.

Q. Now, taking the period from 1937 to 1941, will you

cite an instance where there was such a change in price or practice by the National Lead Company which was not followed?

A. I don't think from memory that I can confine it that close as to time.

Q. Now, that is 1937 to '41, or five years?

A. Well, as I say, over those periods you have the price changes occurring at the rate of perhaps three or four a year, and it is hard for me to say specifically whether there were at that time any prices in effect which were not the same as National's.

Q. Now, I have here a document, Commission's Exhibit 656-A and B, which have been identified as a list of the changes in prices and terms and conditions of sale of white lead in oil by the National Lead Company over a period of time from February, 1930, down through January, 1944.

Will you please examine that and tell me what of the changes which are listed there—starting in January,
3681 1937, and running down through January, 1942—were not followed by Eagle-Picher Company?

Mr. DuBose: Did you identify that by exhibit number?

Mr. Wright: Yes, 656-A and B.

A. That would be difficult to do without making a direct comparison with our price changes at the same time, although this does remind me of some of these quantity prices for lots of various sizes which were in effect at that time, and I know that during that period there were occasions when we could not meet their quantity prices. They would set a price for a certain quantity, and we might have that same price, but on a lesser quantity.

By Mr. Wright:

Q. Now, to what are you referring there in that answer?

A. Well, some of these 1000 or 500 pound prices, and their reference to A, B and C.

Q. Now, I am asking from 1937 on down, and I am assuming that since you became manager of the white lead department in 1937, since you were not going to testify about things that occurred prior to that time—

A. I was the salesmanager in Chicago at that time, and was of course familiar with white lead prices.

Q. Now, I asked you particularly with reference to the period beginning with January 1, 1937.

3682 A. You would have much the same situation in here. I notice that they have some quantity prices, and

I cannot tell you specifically whether our quantity prices applied to exactly those same quantities, or not, but there were many times when our quantities prices were not the same as theirs.

Q. Now, let us get into this column under "Agents". That category of National's was the same as your distributors, was it not?

A. That is right.

Q. And on list price you had a corresponding figure. Now, comparing those two columns all the way down through January 1, 1937, are there any differences there?

A. Well, I cannot say as to that from memory, because there are a good many prices there on different dates. That would be quite a feat of memory to remember each one of those.

Q. You remembered this morning that you had not followed National Lead Company, and you stated that you had not raised the price when they had raised it. I assumed that you had some concrete instance that would be within the time which we are talking about now to illustrate that point.

A. As I recall it, there was no reference to the time this morning.

Q. Well, now, what time period did you refer to, then, this morning?

A. I was speaking generally about our practice 3683 during the period with which I am familiar.

Q. Well, now, this period that I have been talking to you about covers the first half of your experience in charge of that division, the period from 1937 through '41. Then the things that you were speaking of this morning, and on which your answers this morning were based, occurred subsequent to 1941?

A. Well, from the document you have shown me, I cannot state specifically whether any of the variations that I mentioned this morning occurred precisely during that period or not.

Q. In other words, you don't recall precise variations?

A. I recall the variations, but I don't recall exactly the time period in which they occurred.

Q. What were the variations?

A. Principally the ones that I mentioned as to differences in relationship between price and quality involved.

Q. Do you have a record of the price changes that

Eagle-Picher Company has made in its white lead in oil over the period since you have been in charge?

A. I think so.

Q. That would show all the various classifications as to quantity and dates of the changes?

A. Yes, with this exception, that oftentimes the cards as published and when published would carry a price
3684 for a given quantity that might not later be adhered to because it was less impractical.

Q. Will you explain that?

A. I mean that we might announce a price for a ton, and it might later develop that it was impractical to maintain that quantity, and we had to shave that and accept a thousand pounds at that price.

Q. In other words, you were departing from your announced terms and conditions of sale?

A. Because of the competitive situation.

Q. Now, it was the departures from your announced published terms and conditions that you were referring to when you said that you did not always follow National?

A. That may be. I am not too clear on that, because after the cards were out sometimes the actual schedules in effect would drift away from the announcements as made on the cards.

Q. Well, did that occur as to dealers and distributors?

A. Well, we have never had but very few dealers accounts, and I am thinking mostly of the distributors.

Q. In other words, the quantity differentials that applied to the distributors?

A. That is right.

Q. Under consignment contracts? I take it distributors were under consignment contract?

A. Now, again if you are limiting yourself to the
3685 consignment period, I don't think that that statement would apply because the consignment contract was in effect on any quantity contract.

Q. In other words, you did not make the quantity differentials to people under consignment?

A. That is right.

Q. Now, when did you abandon the consignment contract?

A. During the war, the early stages of the war.

Q. So then in the period that I was talking about from

1937 up to 1941 or '42 there would have been no quantity discounts to any of your distributors?

A. That is probably true.

Q. Well, don't you know?

A. Well, I cannot be specific on that particular period, because I don't have the record before me.

Q. Well, then, can you tell me what types of customers you did give those quantity discounts to in that period from '37 to 41 or '42?

A. Well, our direct sales to painters, for instance. Does that answer your question?

Q. Are there any other classes?

A. Well, that would be about the only type. We would have only those two types that amount to anything in our volume of sales, the distributor and the direct sale to the painter.

Q. In the period from '37 to '41, how would your
3686 sales volume be divided as between distributors and painters, direct sales to painters?

A. Oh, I suppose 90 percent of it would be through distributors.

Q. So then these deviations that you have been talking about on quantity would only apply at most to about 10 percent of your business during that period?

A. That is right, during that particular period.

Q. Now, can you tell me whether there has been in your recollection any change in list price of white lead in oil, that is consumer price, by National Lead Company that has not been followed promptly by the Eagle-Picher Company?

A. Well, usually those changes would affect all classes of trade at the same time, and the same exception would apply except that the consumer or list price, as far as we as manufacturers are concerned, is a nominal price because we have very few transactions on that basis.

Q. In other words, you don't sell at that price?

A. That is right.

Q. But you do suggest that to your dealers on consignment accounts?

A. That is right.

Q. Well, then, if these prices of white lead in oil move on a whole scale, so that the list price, dealer price and painter price would be affected by any change, can
3687 you tell me any changes now in the period up to the end of 1945 in that scale, in that whole scale of prices,

leaving for the moment the question of quantities and quantity discounts, where such changes by National have not been followed by Eagle-Picher?

A. Not in that period that you mentioned, I don't think there were any exceptions or occasions where they didn't follow.

Mr. Wright: I have no further examination.

Trial Examiner Norwood: Are there any further questions?

Mr. Wood: Nothing further.

Trial Examiner Norwood: You are excused.

(Witness excused.)

Mr. Du Bose: Could we get off the record a moment?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. Wright: I have discussions with counsel for Sherwin-Williams, and they advise me that they are prepared to go forward with their presentation of evidence in Cleveland, Ohio, on the 15th, 16th, and 17th of October.

I have consulted with other respondents in the case, and they have advised that following that hearing—

Trial Examiner Norwood: 15th, 16th, and 17th?

Mr. Wright: Yes, sir.

3688 Trial Examiner Norwood: All right.

Mr. Wright: Just prior to or immediately following the election in the early part of November, they are prepared to go forward and clean up the few remaining ends of the testimony so that it will all be in and complete before the 15th of November, as I understand it.

Trial Examiner Norwood: National Lead will begin in November?

Mr. Ewing: Well, whatever loose ends there are, ours and anybody else's will go in early in November.

Trial Examiner Norwood: I see.

Mr. Wood: Eagle-Picher has very little if any more testimony in the case. I have to go over the record and see whether there are loose ends.

Trial Examiner Norwood: I see.

Mr. Wood: As I have said before, Mr. Wright and I may be able to clean them up by stipulation.

Mr. Wright: We will make every effort to.

Trial Examiner Norwood: You say in October you want to go to Cleveland; is that right?

Mr. Wright: Yes; Sherwin-Williams has a number of witnesses there, and I understand it will be inconvenient to bring them all down here.

Trial Examiner Norwood: All right. Now, where do you go from there.

3689 Mr. Ewing: Either here or New York or both. We can determine that out there.

Mr. Wright: Since there are several counsel involved, perhaps it would be better to get them to determine that between now and the 15th.

Mr. Ewing: What I had in mind is that I would naturally like to suit your convenience.

Trial Examiner Norwood: Then there is no western trip involved?

Mr. Ewing: There is no western trip involved.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Pursuant to request from and agreement with counsel, it is ordered that the hearing in this case in now adjourned to reconvene in Cleveland, Ohio, in the Federal Building, at 10 o'clock a. m., Cleveland time, on the 15th day of October, 1947, in the Office of the Custodian of the Building or in such room as will be designated by notice posted in that office and given to the Custodian.

(Thereupon, at 2:20 o'clock p. m., the hearing was adjourned until Wednesday, October 15, 1947, in Cleveland, Ohio.)

3690

Room 125,
Federal Building,
Cleveland, Ohio,
October 15, 1947.

Met, pursuant to adjournment at 10:00 a. m.

Before:

John W. Norwood, Trial Examiner.

Appearances:

Joseph Wright, and David R. Reel, Attorneys for the Federal Trade Commission.

J. T. Welch, and T. J. Gray, (Davies, Richberg, Beebe, Busick & Richardson, 15th Street, N. W., Washington D. C.) and T. J. McDowell, (101 Prospect Avenue, Cleveland, Ohio), Attorneys for Sherwin-Williams Company.

Edmund P. Wood, Attorney for Eagle-Picher Lead Company and The Eagle-Picher Sales Company.

Eugene Z. DuBose, (Alexander & Green, 120 Broad-
3691-2 way, New York, New York), for the National Lead Company.

John A. Duncan, (M. B. & H. H. Johnson, 1649 Union Commerce Building, Cleveland, Ohio), Attorney for The Glidden Company.

3693 PROCEEDINGS.

Trial Examiner Norwood: The hearing will come to order.

Pursuant to adjournment on September 18, the hearing in Docket 5253 is now reconvened in Room 125 of the Federal Building in Cleveland, Ohio, at 10 o'clock a. m. on the 15th day of October, 1947.

The appearances are as follows:

J. T. Welsh and T. J. McDowell and T. J. Gray, Attorneys for Sherwin-Williams Company.

Edmund P. Wood, Attorney for Eagle-Picher Company and the Eagle-Picher Sales Company.

John A. Duncan, Attorney for The Glidden Company.

Eugene Z. DuBose, Attorney for National Lead Company.

The attorneys for the Federal Trade Commission are Joseph S. Wright and David R. Reel.

Mr. Welch: I would like to note for the record the additional appearance of Mr. T. J. Gray who has not previously appeared in the case.

We will call as our first witness Mr. Brown.

Trial Examiner Norwood: Give me your full name, please, sir.

The Witness: Harry B. Brown.

Trial Examiner Norwood: Stand up and hold up
3694 your right hand.

(Witness sworn.)

HARRY B. BROWN was thereupon called as a witness for the respondents and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Welsh.

Q. Mr. Brown, how long have you been employed by Sherwin-Williams Company?

A. 27 years.

Q. In what capacity have you been employed?

A. As clerk and price supervisor and at present I am manager of price lists.

Q. How long have you been employed in that capacity?

A. 15 years.

Q. Just what are the duties and functions of that position?

A. The function is to disperse price information, and see that price lists are printed correctly.

Q. Does that also involve seeing that they are sent out to your various district offices, branch offices and stores?

A. Yes, it does.

Q. Are you familiar with the type of price announcement illustrated by Commission's Exhibit 662-B, through 662-Z-26?

A. Yes, I am.

3695 Q. How long have price announcements of that type been used by Sherwin-Williams, to your own knowledge?

A. Practically as long as I have been with the company, 25 years.

Q. Does that answer also apply to the practice of designating on those cards certain shipping points at which the announced prices apply on an f. o. b. basis?

A. Yes.

Q. That has been done for the whole 25-year period?

A. Yes.

Q. Now, when different districts are involved in connection with price announcements of the type we have been discussing, where is the information as to the applicable prices and the applicable f. o. b. shipping points inserted in such announcements?

A. In the trade sales bulletin.

Q. I am afraid you don't understand me. Let me state my question again. When you prepare announcements of the type we have been discussing, 662-W to 662-Z-26, at what point is the information on those cards relative to the prices and relative to the applicable f. o. b. shipping points inserted?

A. At the district point shown on the card.

Q. In other words, you print up the card without the prices and without the shipping points?

A. Yes.

3696 Q. And you send them to the district offices?

A. Yes.

Q. And the district offices put in that information?

A. Yes.

Q. After district offices put in that information, what do they do with the cards?

A. They—

Q. (Interposing.) I am talking just of the type of card we have heretofore mentioned.

A. They send the card to the dealers, with one copy to me, for checking.

Q. Now, when you get that card sent to you for checking, what do you do?

A. I check the prices and the f. o. b. points.

Q. Have you ever had an occasion to find that some f. o. b. points were on there which were not authorized by the general offices?

A. Yes.

Q. What action have you taken in such instances?

A. We have written the district office to remove the card immediately or on the next printing.

Q. Has that been done?
A. Yes.
Q. And the general offices authorize the use of only certain f. o. b. points?
3697 A. Yes.
Q. Now, can you tell me for what purpose announcements such those illustrated by Commission's Exhibit 594-A and B, 662-C and D, 662-G and H, and 662-S and T are disseminated?
A. They are sent to our district sales staff and representatives in branches showing the prices in effect at that date.
Q. For those branches and districts?
A. Yes.
Q. Is that the sole purpose?
A. Yes.
Q. Do those announcements of that type have any bases whatever—correction, strike that. Do those announcements serve as any basis whatever for either quotation or billings to customers, as distinguished from Sherwin-Williams' own branches, districts, and stores?
A. No.
Q. When LCL shipments are made to points which are not f. o. b. points and they are not made from the nearest warehouse or shipping point, how is the freight cost handled?
Mr. Wright: May I have that question read?
Trial Examiner Norwood: Read it.
(The reporter read the question.)
Mr. Wright: I object to that question, your Honor. No basis has been laid for what his answer is based on. If it is a general statement of what the company's policy
3698 is, that is one thing. If it is a statement of their general practice in handling that billing, it is another thing.
This witness so far has not been shown to have anything to do with the actual billing and handling of freight costs.
Mr. Welch: I will withdraw the question.
Trial Examiner Norwood: Very Well.

By Mr. Welch:

Q. Mr. Brown, are you familiar with the company's announced policy as to how LCL shipments are to be handled in those situations where the shipment goes to a

destination which is not one of the recognized shipping points and the shipment actually is shipped from some point other than the nearest shipping point to that ultimate destination?

Mr. Wright: Objection to that, your Honor; there is no product designated in that. This company makes many products.

Mr. Welch: Lead products.

Trial Examiner Norwood: Lead products?

The Witness: Yes.

By Mr. Welch:

Q. What is that?

A. Equalization.

Q. Just explain that.

A. Equalization from shipment to a designated
3699 point other than a warehouse would be equalized with the difference between the cost to that warehouse and to the point at which the shipment is made.

Q. And will you give us—just to clarify that, give us an illustration of that?

A. If, for example, it costs 50 cents to ship from Chicago to Kansas City, and it costs 75 cents to ship to some point within the Kansas City area, we would allow the difference between the shipment to our warehouse and to the designated point.

Trial Examiner Norwood: You would add 25 cents to the f. o. b. price in that case?

The Witness: We would add in that case 15; I said 60.

Trial Examiner Norwood: I thought you said 50.

The Witness: 15 cents.

By Mr. Welch:

Q. In other words, the shipment would originate in Chicago?

A. Yes, it would cost 75 cents to lay it down. It would originally cost 60 cents to get it to Kansas City. We would allow the—

Q. (Interposing.) That is caused by the circumstances whereby you didn't have the stock in Kansas City at that moment so you give the customer the difference in what it would have cost to have gotten it to the warehouse.

3700 A. Yes.

Q. Now, when Sherwin-Williams equalizes freight, that is not an equalization predicated upon any competitor situation, is it?

A. No.

A. I call your attention to Commission's Exhibits 662-A and B, 662-E and F, 662-I, J, K, L, M, N, O, P, Q, R, U, V, and 779-A to D. How many announcements of that type do you prepare?

A. Just a sufficient quantity for our sales staff, branches, and representatives.

Q. That is disseminated to your own employees only?

A. Yes, sir.

Q. Now, do you get those up with different prices on them, or just the one set of prices?

A. One set of prices.

Q. What type of announcements are the only ones issued by Sherwin-Williams which show different prices?

A. These small dealer cards.

Q. Is that the one that appears as Commission's Exhibit 662-W through 662-Z-26?

A. Yes.

Q. That is the type you refer to?

A. Yes.

Mr. Wright: Your Honor, I object to the leading 3701 character of that question by counsel. As I recall it, he said, "What is the only type of card which shows different prices?"

That is subject to proper testimony by the witness as to whether it is the only card. It was a double-barreled question which contained a conclusion by counsel which I don't know whether is ratified by the witness or not.

Trial Examiner Norwood: Off the record just a minute.

(Discussion off the record.)

Trial Examiner Norwood: On the record. Question withdrawn.

By Mr. Welch:

Q. What type of announcements by Sherwin-Williams show different prices?

A. The dealer price card mailed by the district office.

Q. Are you referring to 662-W, to 662-Z-26, inclusive, Commission's Exhibit?

A. Yes.

Q. Is that the only type that shows different prices?
A. Yes.
Q. Sherwin-Williams has sold pigments on an agency or assignment basis since you have been with the company, has it?
A. No.

3702 Q. Mr. Brown, can you tell us how a determination is made as to what are f. o. b. shipping points? I am referring to the types of points referred to or identified in Commission's Exhibit 664.
A. Our own warehouse points have been shown on the dealer price card as illustrated by these exhibits.
Q. Do you have warehouses in each different district?
A. Yes.
Q. How many different districts do you have?
A. The districts change in numbers from year to year as we consolidate.

(Papers were marked Respondents' Exhibits 197-A, 197-B, 197-C, 197-D, 197-E, 197-F, 197-G, 197-H and 198-A, 198-B, 198-C, 198-D, 198-E, 198-F, 198-G and 198-H for identification.)

By Mr. Welch:

Q. Mr. Brown, I show you Respondents' Exhibits 197-A through H, inclusive. Can you tell us what those are?
A. Those are the dealer price cards issued by the district offices.
Q. Will you name the district offices which issued those?
A. Newark, New Jersey; Boston, Philadelphia, Cincinnati, Kansas City, Dallas, St. Louis, Chicago.
Q. Now, were there any other districts than those you have named?
A. The Cleveland district is missing in that group.

3703 Q. I show you Commission's Exhibit 662-Z-17; is that the comparable Cleveland card for the same date?
A. Yes.
Q. Now then, Respondents' Exhibits 197-A through H inclusive, and Commission's Exhibit 662-Z-17, does that include the price cards issued by all the various districts?
A. Yes.
Q. It does not include the Pacific Coast?
A. No.
Q. Now, I would like you to examine Respondents'

Exhibit 197-A to H, and each of the shipping points indicated thereon and tell me whether at one time or another—strike that. Tell me whether warehouse stocks were maintained in all the cities named on those exhibits for the proper sub numbers.

Trial Examiner Norwood: I think you had better offer those first. They are not in evidence yet.

Mr. Welch: I will offer Respondents' Exhibits 197-A to H, in evidence.

Mr. Wright: No objection.

Trial Examiner Norwood: They may be received.

(The papers referred to, heretofore marked for identification RESPONDENTS' EXHIBITS 197-A, 197-B, 197-C, 197-D, 197-E, 197-F, 197-G, and 197-H, were received in evidence.)

Trial Examiner Norwood: Answer the last question.

3704 (The reporter read the question.)

A. Yes.

By Mr. Welch:

Q. Now, for the period in which those cards were in effect, that is Respondents' Exhibits 197-A to H, inclusive, and Commission's Exhibit 662-Z-17, were the shipping points named on the respective cards the only authorized f. o. b. points?

A. Yes.

Q. I now show you Respondents' Exhibits 198-A to H, and ask you if you can tell me what those documents are?

A. They are cards issued for the different dates.

Q. Do they cover cards issued by all the districts except Cleveland and the Pacific Coast?

A. Yes.

Q. Is Commission's Exhibit 662-Z-1 the comparable Cleveland card for the same date?

A. Yes.

Mr. Welch: Respondents' Exhibits, for identification, 198-A to H, are offered in evidence.

Mr. Wright: No objection.

Trial Examiner Norwood: They may be received.

(The papers referred to, heretofore marked for identification RESPONDENTS' EXHIBITS 198-A, 198-B, 198-C, 198-D, 198-E, 198-F, 198-G and 198-H, were received in evidence.)

3705 By Mr. Welch:

Q. Will you now examine Respondents' Exhibit 197-A to H and Commission's Exhibit 662-Z-21, and tell us whether during the periods those price cards were in effect, warehouse stocks were maintained at each of the shipping points listed?

A. Yes, they do.

Q. That is warehouse stocks?

A. Warehouse stocks.

Q. Now, referring to Respondents Exhibit 197-A to H and Commission's Exhibit 662-Z-17, are those the only points—are the shipping points listed on those exhibits the only points where warehouse stocks were maintained during that time with the exception of the Pacific Coast?

A. Yes.

Q. Now, with reference to Respondents' Exhibits 198-A to H and Commission's Exhibit 662-Z-21, I will ask you the same question, whether those are the only points at which warehouse stocks were maintained?

A. Yes.

Trial Examiner Norwood: We will take a five-minute recess.

(Short recess taken.)

Trial Examiner Norwood: Come to order, please.

Mr. Welch: Your witness.

Cross-Examination by Mr. Wright.

3706 Q. Mr. Brown, how long have you held the position of manager of the price lists with the company?

A. 15 years.

Q. Were you in that work prior to the 15 years, in similar work?

A. Yes.

Q. Now, do your duties cover all the products of the company?

A. Yes.

Q. In that department?

A. Yes, trade sales and industrial.

Q. Now, you spoke of the district offices filling in these cards with the applicable prices and shipping points in their districts, and then sending the cards back to you for checking?

A. Yes.

Q. From what documents or information do they fill in those prices and shipping points?

A. Telegraphic information from Cleveland or letter if it is a week end.

Q. Now, is their basic information the so-called trade sales bulletins?

A. Yes.

Q. Does that include their f. o. b. points for the districts?

A. The trade sales bulletin covers only the billing
3707 to our own inside branches and warehouse points.

Q. Well, now, do these district offices now have any document which they keep currently showing all of this information on prices and points?

A. The document that they have is the bulletin issued by the trade sales department showing them the prices—one price which is in effect. That is the exhibit.

Q. You are referring now to Exhibits like Commission's Exhibit 662-I and sub numbers headed General Sales Department Price Bulletin?

A. Yes.

Q. That is where they get that information?

A. Yes.

Q. Now, your statement with regard to these f. o. b. points and equalization, were you referring throughout your testimony, now, to less than carload shipments?

A. Yes.

Q. What is the situation with regard to f. o. b. points on carload shipments?

A. The shipment is usually laid down at the price differential issued in the bulletin here.

Q. In other words, do I understand you then that in shipping a carload to a point which is not an f. o. b. point within a district, that the f. o. b. —that the price at the f. o. b. point would apply?

3708 A. Yes.

Q. There would be no equalization added freight, then?

A. Yes.

Q. Now, would that also apply to a mixed carload containing paint and paint materials as well as these lead pigments we have been talking about?

A. We have shipped carloads prepaid according to the price applying in the zone.

Q. What do you mean in the zone, now?
A. You are combining paint and lead in your question?
Q. Yes, sir.
A. Lead f. o. b. point has the price on this card.
Q. In other words, a mixed carload of paint and lead not at an f. o. b. point would take the same price as if it had been shipped to the nearest f. o. b. point?
A. Yes.
Q. He would pay nothing extra for freight at that point?
A. No.
Q. Even though it might only contain a hundred pounds of lead and oil in the car—so long as it was a car?
A. Carload.
Q. How do you handle truckload shipments?
A. Full truckload would be handled in the same manner, full truck.

3709 Q. In other words, then, there would be no added freight to the customer not at one of your f. o. b. points, if it were shipped in a truckload?
A. That is right.
Q. Now, these general trade sales department bulletins such as this bulletin No. 99, Commission's Exhibit 662-I, are those sent to your retail stores?
A. Yes.
Q. And those stores get their retail prices from those bulletins; is that correct?
A. They get their cost from the bulletin. The cards are used as the dealer cards.
Q. And you bill them at the same price that you would an ordinary dealer, then?
A. Yes.
Q. And they are expected to resell at the consumer prices which are set forth?
A. Yes.
Q. Now, do any of your retail stores maintain any warehouse stocks?
A. Yes, some. They are indicated on these exhibits.
Q. They are all in there?
A. Yes.
Q. No other retail store than those indicated in those exhibits then maintains any warehouse stocks?
A. No.

3710 Q. Do any stores resell—sell for resale except those which are listed in that exhibit?

A. Not to my knowledge.
Q. That is not the policy of the company?
A. Not the policy.
Q. Well, now, do you have any customers in towns where you have retail stores, dealers, now, which are not warehouse points?

Mr. Welch: Objection, your Honor. There is no showing that this witness has any knowledge of the customers' lists. He is not in the sales department.

Mr. Wright: I am laying the basis for a further question here. If the witness doesn't have any knowledge of this thing, he can certainly state it.

Trial Examiner Norwood: I think he may ask that on cross-examination. Objection overruled.

The witness: May I hear the question again?

Mr. Wright: Will you read the question?

(The reporter read the question.)

Mr. Welch: I would like to make a further objection. It was not restricted to proper cross-examination.

Mr. Wright: In answer to counsel's objection there, he has raised some issues about the general pricing policy of the company and he has covered it completely and this question is getting into the—this witness' know-
3711 ledge of that pricing policy and how it works out.

Trial Examiner Norwood: I think he may test his knowledge about it, in connection with the scope of the direct examination. Objection overruled.

(The question was again read by the reporter.)

Trial Examiner Norwood: Answer the question.

The witness: Not to my knowledge.

By Mr. Wright:

Q. Now, let me ask you this, if you know: We will assume for the purpose of this question, now, that you have a retail store in a city which is not an f. o. b. point on those cards, and that you have a dealer-customer in that same point. Would you sell to your retail store—I will withdraw that question.

When you sell to one of your own retail stores which is not at an f. o. b. point, how do you make the price to him? Do you equalize freight to him?

Mr. Welch: I object to any testimony with reference to the company and their own retail stores. That certainly isn't commerce or anything the Commission has jurisdiction over.

Trial Examiner Norwood: I think he may ask that question. It is proper on cross-examination to test him or to get further particulars about this system. Objection overruled.

3712 The Witness: Not to my knowledge.

By Mr. Wright:

Q. You sell him then at the same price as if he were at an f. o. b. point?

A. I have nothing to do with the pricing in the districts to the dealer or the inter-company transactions.

Q. Now, you make up these general trade sales department bulletins, do you not?

A. Yes.

Q. Which are supposed to govern the pricing practices of the district, do you not?

A. Yes.

Q. How do those general trade sales department bulletins instruct the district branches to bill the company-owned stores on these products?

Mr. Welch: Objection. The bulletin speaks for itself with reference to any instructions that may or may not be given.

Secondly, I want to move to strike all the testimony that has heretofore been given by this witness on cross-examination with respect to transactions between the company and its own stores because those are not sales.

Mr. Wright: It is—

Mr. Welch: (Interposing.) There is no testimony that there are sales.

3713 Mr. Wright: This record is already replete with information about the company-owned stores and the transactions there, and it is my contention that one of the issues in this case is that this Respondent has put into practice through its own retail stores these policies and matters that were agreed on as charged in the complaint through conspiracy in combination and has made effective the combination and conspiracy in that manner.

Trial Examiner Norwood: Motion denied.

Is there a question pending?

(The pending question was read by the reporter.)

Mr. Welch: Has your Honor overruled my objection to that as well as the motion to strike?

Trial Examiner Norwood: Yes. Objection overruled.

The Witness: It gives the prices in effect at some particular date and it gives the policy according to the zone differentials applying at the various branches and warehouses.

By Mr. Wright:

Q. Well, now, getting into this list of points as in Commission's Exhibit 662-C and D, will you tell us what that list of points is?

A. It states the S-W warehouses in each district branch zone points.

Q. All of these points aren't warehouses, are they?

A. No, they are not.

3714 Q. So that those points, for instance, as Bridgeport, Connecticut, there is no warehouse there, is there?

A. It would be stated on this if there is a warehouse there at the time these cards are issued.

Trial Examiner Norwood: Stated on what?

The Witness: On the dealer card; our warehouse point is stated here, and it would change as time goes on. We will make a new distributing point, and these must be compared with respect to the approximate date on our trade sales bulletins.

Trial Examiner Norwood: You mean the card like Respondents' Exhibit 197-A and so on?

The Witness: Yes.

Trial Examiner Norwood: Proceed.

By Mr. Wright:

Q. You are familiar with the warehouses the company has had during the last five or six years, are you not?

A. I might be able to remember all of them.

Q. All right. Now, can you recall approximately where the warehouses were in May, 1942?

A. I could not name them, no; because I am not in the stock-keeping department.

Q. Now, let me ask you this: Do you recall that the company ever had a warehouse at Bethesda, Maryland, in May, 1942?

A. They did not.

3715 Q. Did not?

A. No.

Q. At Appleton, Wisconsin?

A. In 1942?

Q. Yes.
A. I don't recall.
Q. Asbury, New Jersey?
A. No.
Q. I call your attention to the fact that Bethesda, Maryland, and—in this Exhibit 662-S, will you tell me what that letter "E" means?
A. Eastern or base price.
Q. In other words, if the letter "E" is there, it takes the base price, these is nothing added for freight to that?
A. It is sold f.o.b. our warehouses. There is nothing to—added to the cost at that point as far as there is no warehouse.
Q. In other words, even though there is no warehouse at Bethesda, the "E" after that indicates that your company-owned store in Bethesda is billed at the flat eastern zone price; is that not correct?
A. I would say that is correct. They are billed at eastern prices.
Q. And no additional freight is added from equalizing from the warehouse?
A. I am not familiar with the inter-company billing policy.
3716 Q. Can you state who in the Sherwin-Williams organization is familiar with that?
A. I believe your comptroller would have charge of that, Mr. Reese.
Q. Now, this equalization to a point that is not an f.o.b. point there, what freight rates do you use in equalizing on an LCL shipment to a point that is not an f.o.b. point?
A. I am not in the traffic freight billing department. I I am sorry, I can't answer that.
Q. I am talking now about the making of price. You state how the price is to be made and what the company policy is with reference to these prices. What is the policy as to how that is to be calculated?
A. If the price would apply at some zone point where a quarter or a half cent would apply, that price would be used f.o.b. that point, and it would be equalized as I have said, from the difference between the warehouse to the customer *vs.* the Chicago warehouse to the distant point.
Q. Didn't you state before, it would be equalized by the rate between the company and the warehouse, and the company and the customer, rather than from the warehouse to the customer?

A. I said the freight would be, but the price would apply at the warehouse point from which they normally draw their supplies.

Q. That is correct. Now, you used an illustration
3717 of a freight rate of 75 cents from the plant to the customer?

A. Yes.

Q. And a freight rate of 60 cents from the point to the f.o.b. point?

A. Yes.

Q. In that case, you said you would add 15 cents for delivery to that point other than the f.o.b. point?

A. Yes.

Q. Now, what freight rate are you using for purposes of comparison from the plant to the warehouse? Are you using an LCL freight rate, or a carload freight rate?

A. I was using the LCL freight rate.

Q. From the plant to the warehouse?

A. Yes.

Q. Well, you don't customarily ship LCL to warehouse from the plant, do you?

A. I don't know.

Q. Will you tell us what the Pacific Coast District is?

A. The Pacific Coast District receives a wire regarding price changes at the same time the other districts get their report. They usually issue their own price lists according to the market's trend at that point.

Q. Do you send them any bulletin comparable to the general trade sales department bulletins?

A. They get one copy.

3718 Q. They get that bulletin?

A. Just that one copy.

Q. Do they send you in their price lists?

A. They do not print cards similar to these, I do not get them.

Q. How do they get the prices?

A. They issue a price insert for their representatives.

Q. How many districts are there in the Pacific Coast?

A. One at present. They are having three.

Q. Where do you get the information that you put in these general trade sales department bulletins?

A. From the Executive Committee.

Q. From the Executive Committee at the company?

A. Yes.

Q. Mr. Brown, do I understand your testimony, then,

that all of the towns and cities where Sherwin-Williams has retail stores are not f.o.b. points?

A. They are not considered as such. This indicates the f.o.b. points.

Q. You don't know what the actual company practice of handling transactions is in those towns and cities, though?

A. I do not.

Mr. Wright: No further questions.

Redirect Examination by Mr. Welch.

3719 Q. Mr. Brown, when you refer to the Executive Committee, do you mean the trade sales executive committee; is that the group you mean?,

A. Yes.

Mr. Welch: That is all.

Trial Examiner Norwood: You may be excused.

(Witness excused.)

Trial Examiner Norwood: Call your next witness.

Trial Examiner Norwood: What is your name, please, sir?

The Witness: Kenneth J. Sutherell.

KENNETH J. SUTHERELL was thereupon called as a witness for the Respondents, and, having been first duly sworn, testified as follows:

Direct Examination by Mr. Welch.

Q. Mr. Sutherell, how long have you been employed by the Sherwin-Williams Company?

A. Nine years.

Q. In what capacity?

A. In the general traffic department.

Q. In what capacity are you now employed?

A. Assistant chief clerk in charge of the rate section.

Q. How long have you been in that capacity?

3720 A. Since January of 1946.

Q. What are the duties of that position?

A. To supervise all rates which are checked in the traffic department and to check the rates also.

Q. What previous experience with freight rates did you have before you were employed by Sherwin-Williams?

A. Two years with Master Builders Company in Cleveland.

Q. What was the nature of the freight work you did there?

A. In the general traffic department, rates and general traffic work.

Q. To what extent are you familiar with freight rates and tariffs, procedures for calculating applicable rates between various cities for lead pigments?

A. I work with them all the time, it is my job to know them.

Q. Have you ever prepared any charts or analyses for use in hearings before the Interstate Commerce Commission?

A. Yes, I have.

Q. Such charts as you prepared for that purpose have been used in the course of hearings before the Interstate Commerce Commission?

A. Yes, they have.

Q. Have you been asked to make any maps showing freight rate information relative to lead pigments, especially white lead, both dry and in oil?

A. Yes, I have.

3721 Q. What freight information were you asked to portray on those maps?

A. I was given a list of the white lead producing points and asked to show the areas to which these—within which these producing points could ship at a freight advantage, using the freight rates in effect as of January 15, 1941.

Q. Now, was the location of the white lead producing plants and the dates of the tariffs to be used the only information that came to you from an outside source?

A. Yes.

Q. That is at the time you started the project, that is all that came to you from an outside source?

A. Yes.

Q. Everything except that is a result of your own work?

A. Or under my supervision.

Q. Now, I show you Respondents' Exhibit 199 for identification.

(The document referred to was marked Respondents' Exhibit 199 for identification.)

By Mr. Welch:

Q. Who prepared that document?

A. I did.

Q. Was that entirely your own work?
A. Yes, it was.
Q. Can you tell us whether that is a map that you
3722 prepared in response to that request for information?
A. It is.
Q. Well, now, will you tell us just step by step the procedure you followed in order to get the result now reflected on that map?
A. I considered two or more producing mills of white lead and I located a town in between those mills to which the rate was equal from both or more of the mills.
I located that city or town on the map and marked it. I then checked rates to points around that town, or on either side of it, until I located another point to which the rates were equal.
Q. Just one minute. On an average, how many points would you check the rates on before you could locate one point that had those characteristics?
A. I would say 30 points.
Q. And then when you located your next point, how many would have to be examined?
A. Probably the same number, sometimes more, sometimes less.
Q. Would that general average hold?
A. I would say so.
Q. Proceed.
A. I followed the same procedure all over the country, taking one producing mill against another one. When I had
located all the points to which the rates were equal, I
3723 drew lines which indicate the areas within which the producing mill can ship at a freight advantage.
In other words, these lines represent the boundary line on freight costs. A mill in Chicago shipping over the line would be—
Q. (Interposing.) Over which line is that?
A. Over the line running from Seelyville, Indiana, to Pewey, Nebraska. The rate over that line would exceed the rate from a mill in St. Louis.
Q. All right. Now take the line that runs from Pensacola, Florida to Detroit. What would be the situation with respect to the mills lying on the different sides of those lines?
A. The mill lying on the east side of that line running from Wayne, Michigan, to Pensacola, would be able to ship

within that area cheaper than the mills in Chicago, Hammond, or St. Louis.

Trial Examiner Norwood: To any points in that area?

By Mr. Welch:

Q. What mill?

A. From the mill at Cincinnati.

Mr. Welch: Now answer the Examiner's question.

The Witness: Within that area. There might be variations, but that possibly is very remote.

By Mr. Welch:

Q. What would be the situation with reference to
3724 the St. Louis plant?

A. The St. Louis plant would be able to ship within the area bounded by this line from Seelyville, Indiana, to Pewey, Nebraska, and from Seelyville, to Pensacola, Florida, to the line from San Francisco, from Oakland.

Q. At an advantage?

A. At an advantage.

Q. Over which mills?

A. The mills located at Oakland, and—

Trial Examiner Norwood: (Interposing.) I don't think you had better go into what the map shows. You can tell us what it shows but not go further than that. You haven't offered it.

Mr. Welch: I offer Respondents' Exhibit 199.

Mr. Wright: I have some preliminary questions on this, your Honor.

Trial Examiner Norwood: All right.

Cross-Examination by Mr. Wright.

Q. Do I understand your testimony, then, substantially, Mr. Sutherell, that one of the mills or points underlined in red here would have a freight advantage in shipping to all of the territory within the lines bounding it?

A. Yes.

Q. Now, are railroad rates on a mileage basis?

3725 A. Generally speaking, they are on a mileage basis. Certain towns are grouped in certain territories.

Q. Well, now, are the tariffs based on a mileage basis; did you mean that, the official tariffs?

A. The rate scales are based on a mileage basis.

Q. That is generally true?

A. The formula for establishing rates?

Q. Now, take this area around Chicago that is bounded by these lines which appear on here, what type of rates would you consult on that? Are those commodity rates?

A. The lowest rates.

Q. I asked what rates you consulted in order to determine the lowest rates—what tariffs you consulted?

A. Consulted the applicable tariffs.

Q. Did you compare commodity rates and class rates in each instance?

A. Yes, I did.

Q. But you went down these lines, as I take it, getting these points. Did you consult rates that were within the lines, rate points within the lines 10, 15, 20 miles?

A. Yes.

Q. How far back from the lines did you go in consulting all those rates?

A. I don't know how far I went back in mileage.

Q. Did you keep any record of the rates to these 3726 points along the lines in the tariff reference?

A. Yes.

Q. So that you had documents to show what these rates are from these points and tariff sources from which you secured them?

A. The documents are available.

Q. Do you have them in your possession now?

A. I don't. I have the rates. I do not have the tariff authorities in my possession.

Q. In determining some of these rates to these points along the line, were there joint rates and routes involved in those determinations?

A. Yes.

Q. How did you determine the lowest rate in that, or did you determine the lowest rate?

A. We did. These rates are the lowest rates.

Q. You consulted, then, every possible routing and every possible combination to obtain your lowest combination rate?

A. Yes.

Q. Now, speaking as a freight rate expert, is it your opinion that there is no rate in this territory around Cincinnati which is behind the line bounding Cincinnati which is lower from St. Louis or Chicago or Philadelphia.

A. No. I won't say there is no rate. As I stated before,

sometimes certain a group of towns takes the same rate.

3727 In other words, there might be a town one mile behind that line which would be just as cheap to ship from either point.

Q. In other words, then, that can't be an absolute line, freight rates being what they are?

A. Generally speaking, it can.

Q. Will you explain yourself?

A. Within some territories, it can be. Some territories are specific mileage rates to a specific point. In other territories, those rates are grouped, those towns are grouped.

Mr. Wright: No further preliminary cross-examination. I want to object to the offer of this exhibit, however.

It is common knowledge, your Honor, that freight rates are the matters that are subject to controversy among traffic experts and many of them will come out with different pictures of rates and routes.

Here we are given absolutely no basic data, traffic reference, or rates applicable to any of these points along the line which make up these territories.

Furthermore, I object to the document on the grounds of relevancy and materiality.

Mr. Welch: Will you read the last part of that objection?

(Objection read.)

Mr. Welch: The last part of that is easy to answer

3728 in view of the answer setting forth an affirmative defense and no motion to strike was made and the exhibit is competent on that basis.

Secondly, we have stated—the witness has stated that he does have the rates available, on his person. Mr. Wright didn't request to see them. They are here.

As to the tariffs, the witness states that information is available, but he doesn't have it here with him at the moment. He does have the rate; the tariff sources from which they were taken, he does not have.

Trial Examiner Norwood: Objection overruled. The exhibit is received, Respondents' Exhibit 199.

(The document referred to, heretofore marked for identification RESPONDENTS' EXHIBIT 199, was received in evidence.)

Mr. Wright: Your Honor, at this point, if this document is received, I want to call on Respondents to produce the

list of rates and references from which this document was made up.

Trial Examiner Norwood: Well, I understood that they would be produced. That would be a condition attached to the reception of this exhibit.

Mr. Welch: We are agreeable to that.

Trial Examiner Norwood: Specified sufficiently to enable the other side to check its accuracy.

3729 Mr. Welch: We are agreeable to that.

Trial Examiner Norwood: Proceed.

Mr. Welch: I think we will be able to supply that by tomorrow, and if Mr. Wright then wants to call the witness for further cross-examination in the light of that material being furnished, we will have the witness available.

I take it, however, the exhibit is now received subject to motion to strike if we do not furnish the material, so I can proceed on the theory that it has been received?

Trial Examiner Norwood: Yes. This is a document that has required a great deal of study and work, and I should think that this witness should be subject to recall after the other side has had sufficient time to study and check it. I think that should be a condition, also.

Go ahead.

Direct Examination (Continued) by Mr. Welch.

Q. I believe at the time we were interrupted for cross-examination, we were discussing a situation as between the St. Louis, Cincinnati, and Chicago locations?

A. Yes.

Q. We had gotten to the point where we were discussing the area in which St. Louis would have an advantage. As a freight rate expert, can you tell us on a broad basis just what this map shows concerning the freight rate sit-

3730 uation of producers of white lead located in the respective cities of Philadelphia, Scranton, Perth Amboy, Cincinnati, Chicago, St. Louis, Oakland, California?

A. It shows that producers of white lead in those points which you mentioned can ship within that area—

Q. (Interposing.) That is within the area—

A. (Interposing.) Bounded by lines.

Trial Examiner Norwood: The colored triple lines.

The Witness: In some cases—at a freight advantage over a competitor in an adjoining area.

By Mr. Welch:

Q. How long did it take you to make up this study, Mr. Sutherell?

A. Approximately four months.

Q. Did you spend the major portion of that time on looking up the rates and the tariffs?

A. Yes, yes.

Q. I believe on cross-examination you stated that you had taken into account commodity rates, classifications, exceptions?

A. Yes.

Q. And it is now your testimony that those are the lowest rates in those areas?

A. Yes.

Trial Examiner Norwood: One of those boundaries is indicated by a triple line. Off the record.

3731 (Discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. Welch: I will clear that up.

By Mr. Welch:

Q. Mr. Sutherell, will you explain the significance of the blue line?

A. The blue line covers rates on dry white lead.

Q. Will you explain the red line?

A. The red line covers rates on white lead in oil.

Q. Do the red and blue refer to carload or less than carloads?

A. Carload.

Q. What does the green line represent?

A. The green line represents LCL rates on both dry white lead and lead in oil.

Q. In less than carload lots?

A. Yes.

Q. Now, I notice throughout the entire part of the eastern United States and up to western North Dakota, South Dakota, Nebraska, Colorado, and New Mexico, the three lines practically coincide. Will you explain why there is a divergence between the lines in the western part of the United States?

A. Most of those rates have specific commodity rates, being based on different formulas; the carload rates and less than carload rates are based on different formulas.

3732 Q. But in the east they are based on the same or different formulas?

A. On the same formulas.

Q. And that is the reason the lines coincide?

A. That is right.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record. Proceed.

Mr. Welch: I would like to have this marked.

(The map referred to was marked RESPONDENTS' EXHIBIT 200 for identification.)

By Mr. Welch:

Q. Mr. Sutherell, were you asked to make any map showing freight rates and information relative to red lead, both dry and in oil?

A. Yes, I was.

Q. What freight information were you asked to portray on that map?

A. I was given a list of red lead producing points and asked to show on a map the areas to which those producing points—within which those producing points could ship at a freight advantage.

Q. What period were you requested to use in making your calculation?

A. As of January 15, 1941.

3733 Q. Is the location of the red lead producing plants and the date of the freight rates desired the only information that came to you from an outside source at the time you started your studies?

A. Yes.

Q. I show you a map which has been marked as Respondents' Exhibit 200 for identification. Can you tell us what that is?

A. This map shows producing points of red lead and it shows the areas within which these producing points can ship at a freight advantage.

Q. Did you prepare this map yourself?

A. I did not. It was prepared under my supervision.

Q. Did you direct the procedure that was to be followed in preparing it?

A. Yes, I did.

Q. Did you personally spot check the accuracy of the work being done?

A. Yes, I did.

Q. To what extent, if any, did the procedure followed in preparing this map conform to the procedure you have detailed with reference to Respondents' Exhibit No. 199?

A. The procedure was exactly the same.

Q. Can you tell us how long the man who worked on that map took to check the rate data, tariff data, and prepare the map?

A. Approximately three months.

3734 Q. Now, as an expert on freight rates—

Mr. Welch: I will offer Respondents' Exhibit No. 200, subject to the same limitations which have heretofore been imposed by the Examiner.

Mr. Wright: I want to ask a preliminary question.

Trial Examiner Norwood: All right.

Cross-Examination by Mr. Wright.

Q. Calling your attention to the three words appearing underneath the description, "red lead," reading "same manufacturing costs," did you place that there?

A. No.

Q. Was it placed there at your direction?

A. No, it wasn't.

Q. How did that get on the document?

A. That was placed there by way of explanation of the map by the legal department.

Mr. Welch: Let him ask a question which will clear that up.

Direct Examination (Continued) by Mr. Welch.

Q. Was an assumed identical manufacturing cost one other item furnished to you at the time you prepared the two maps?

A. Yes, yes.

Mr. Wright: No further questions at this time.

3735 By Mr. Welch:

Q. In other words, you were given the location of the plants and assumed identical manufacturing costs and your studies thereafter were predicated upon rate differences; is that correct?

A. Yes.

Mr. Wright: Do you have available the basic—the rates and references that you used in making this?

The Witness: Yes.

Mr. Welch: I offer it subject to that qualification.

Trial Examiner Norwood: Received.

(The map referred to, heretofore marked for identification RESPONDENTS' EXHIBIT 200, was received in evidence.)

Mr. Wright: I would like to have the same opportunity of deferring cross-examination after a reasonable opportunity for examining this exhibit.

Trial Examiner Norwood: He offered it under those conditions.

Mr. Wright: I want the record to note my objection to the receipt of it in evidence.

Trial Examiner Norwood: Objection overruled. It is received under the conditions heretofore applied to Respondents' Exhibit No. 199.

By Mr. Welch:

3736 Q. What does the blue line represent?

A. The blue line represents carload rates on dry red lead.

Q. What does the red line represent?

A. The red line represents carload rates on red lead in oil.

Q. What does the green line represent?

A. The green line represents less than carload rates on both dry red lead and red lead in oil.

Q. They are identical?

A. The LCL rates on dry red lead and red lead in oil are identical.

Q. Will you explain to us why you have the blue lines and the red lines in the form of two arrows out in the State of New Mexico and Colorado?

A. That is to indicate that from that point on until the next beyond red and blue line is reached, the rates would be equal from both Joplin and Dallas in view of the fact that transcontinental rates are maximum rates to that territory.

Q. Now, at which point would that rate identity between Joplin and Dallas begin?

A. At Grand, New Mexico.

Q. And from that point on, they would share—would they share the same territory?

A. They would share the same territory.

Q. And that is because of what?

A. Because of the transcontinental rates being the

3737 maximum rates.

Q. In other words, they have reached the highest freight rate they can reach?

A. Yes.

Q. Now, will you explain why it is that you have a certain area marked as served by both Newark and Brooklyn, whereas you also have separate exclusive territories for those two plants?

A. Newark and Brooklyn—I will start that over. The rates from Newark and Brooklyn to nearby points are different until a certain distance is reached. From there on, they become equal from both Newark and Brooklyn.

Q. Now, as an expert on freight rates, will you tell us just what this map shows concerning the freight rate situation on producers of red lead located in the respective cities which are underscored in red ink?

Mr. Wright: I object. The document speaks for itself. It has been identified. I don't think this witness has any proper basis for testifying as an expert on the significance of the document.

Mr. Welch: All the document shows is just some lines. We want to show what the significance is from a freight rate situation. Mr. Wright has examined this witness himself and asked questions predicated upon his being a freight rate expert. It comes at a late date to object to his being such.

Mr. Wright: I am not objecting to his being an ex-
3738 pert, I am objecting to his explaining as an expert a document which has been fully identified and put in the record. The document speaks for itself.

Trial Examiner Norwood: I think if it is conceded that this witness is sufficiently qualified as an expert—if it isn't conceded, I will review the evidence on it—if it is, he may give his opinion about various points raised in this case with respect to the freight, freight advantages, but I think the question is a little too general.

You may ask his opinion about different things there, but as to the entire scope of the map and what it shows, I believe that question is too broad. I will sustain the objection.

By Mr. Welch:

Q. Mr. Sutherell, will you state what this map shows concerning the freight rate situation of the red lead producer located at Atlanta, Georgia?

A. This map shows that the red lead producer at Atlanta, Georgia, can ship to the area bounded by lines running from Houma, Louisiana, over around Wilmington,

North Carolina, at a freight advantage over mills located at Dallas, St. Louis, Charleston, and Philadelphia.

Trial Examiner Norwood: Can't anybody look at that map and tell that it shows that in the light of your testimony here?

The Witness: I would say so.

3739 Mr. DuBose: Is that Charleston, West Virginia?

The Witness: Yes.

By Mr. Welch:

Q. Does this map show the same condition with respect to area surrounding each of the other points underscored as producing points?

A. It shows the same condition as the other map.

Q. Does it show the same condition as you have described with reference to the producer at Atlanta?

A. Yes, exactly the same condition.

Mr. Welch: That is all.

Trial Examiner Norwood: Anything further?

Cross-Examination (Continued) by Mr. Wright.

Q. You said Respondents' Exhibit 200 was prepared under your supervision by somebody else?

A. Mr. Leggett.

Q. What is his capacity?

A. Rate clerk.

Q. How long has he been so engaged?

A. With the Sherwin-Williams Company, for three years.

Q. Prior to that time?

A. For approximately three years, with a motor carrier.

Mr. Wright: No further cross-examination at this time.

3740 Mr. Welch: That is all.

(Witness excused.)

Trial Examiner Norwood: Call your next witness.

Mr. Welch: That is all we have for today. Our other witnesses are out of town, but I think we will finish tomorrow.

I would like to have temporary possession of Respondents' Exhibit 197-A to H and 198-A to H for the purpose of having photostats made to substitute with them.

Trial Examiner Norwood: You may have those.

We will recess until 10 o'clock tomorrow morning.

(Whereupon, at 11:55 a.m., October 15, 1947, the hearing in the above-entitled matter was adjourned.)

3741 Room 125, Federal Building,
Cleveland, Ohio;
Thursday, October 16, 1947.

Met, pursuant to adjournment, at 10:00 a.m.

Before:

John W. Norwood, Trial Examiner.

Appearances:

Joseph Wright, (and)
David R. Reel, Attorneys for the Federal Trade Commission.

J. T. Welch, (Davies, Richberg, Beebe, Busick and Richardson, Esqr's., 15th Street, N. W., Washington, D. C.), and

T. J. McDowell, (and)
T. J. Gray, (101 Prospect Avenue, Cleveland, Ohio), Attorneys for Sherwin Williams Company.

Edmund P. Wood, Attorney for Eagle-Picher Lead Company, and The Eagle-Picher Sales Company.

Eugene Z. DuBose, (Alexander and Green, 120 Broadway, New York, New York), for the National Lead Company.

3742 John A. Duncan, (M. B. & H. H. Johnson, 1649 Union Commerce Building, Cleveland, Ohio), Attorney for The Glidden Company.

3743 PROCEEDINGS.

Trial Examiner Norwood: The hearing will come to order.

Pursuant to adjournment of yesterday, the hearing is now reconvened in Room 125 of the Federal Post Office Building, Cleveland, Ohio, at 10:00 o'clock, a.m., on the 16th day of October, 1947.

The appearances are as follows:

J. T. Welch and T. J. McDowell and T. J. Gray, Attorneys for Sherwin-Williams Company.

Edmund P. Wood, Attorney for Eagle-Picher Company and the Eagle-Picher Sales Company.

John A. Duncan, Attorney for The Glidden Company.

Eugene Z. DuBose, Attorney for National Lead Company.

The attorneys for the Federal Trade Commission are Joseph S. Wright and David R. Reel.

The Court: Call your witness.

H. C. LEMKE was thereupon called as a witness for the Respondents and, having been first duly sworn, testified as follows:

Direct Examination.

Trial Examiner Norwood: Give us your full name, please.

3744 The Witness: H. C. Lemke.

By Mr. Welch:

Q. Mr. Lemke, how long have you been employed by the Sherwin-Williams Company?

A. Twenty years.

Q. And what positions have you held in that company?

A. I worked in branch offices as bookkeeper, cashier, district offices, and in the Accounting Department, assistant to the Credit Manager, in the district offices, and Auditing, and I now have charge of the Auditing Department of the Sherwin-Williams Company.

Q. How long have you had charge of the Auditing Department?

A. 1941.

Q. Continuously since that date?

A. Pardon me?

Q. Continuously since that date?

A. Yes, sir, continuously.

Q. What are the duties of that position?

A. The duties of this position are the supervising of men. As a department, we audit branches, offices, locations of the Sherwin-Williams Company.

Q. Does that include an audit of the division and district offices as well?

A. Yes, sir, district and division offices are included.

Q. What is the extent of your personal familiarity 3745 with auditing division and district invoices?

A. Well, I worked, personally checking this work, approximately five years before I became—before I became in charge of this department. And I have worked with

our men, reviewing reports since I have been in charge of this department; plus the fact I visit special locations where we conduct audits.

Q. Why do you audit the invoices arising from the district and division offices?

A. Well, there are a number of reasons why we would audit invoices. It is a part—it is a phase of our procedure, and therefore we review all of our procedures in our branches district and division offices.

Q. It is the procedure in the branch, division and district offices with respect to freight policies as applied to lead products, one of the procedures which you review?

A. Yes, sir, it is.

Q. To what extent, as the result of that review of the procedures as to freight policies, to which extent, if any, are you familiar with the general freight policies of the Sherwin-Williams Company as to lead products?

A. Well, we ship lead products from various points.

Q. Just one second. My question is to what extent you are familiar with the general freight policy?

A. Well, I know what the policy is. I know what 3746 our method of shipping is and our procedure.

Q. Is there any variance in that freight policy as between the lead products, such as dry white lead, white lead and oil, dry red lead, dry red lead and oil and litharge?

A. No, it is the same policy.

Q. The freight policy is the same with respect to all of those products?

A. Yes.

Q. What is the policy with respect to carload shipments of lead products?

A. We ship from factory point to customer, and Sherwin-Williams pays the freight.

Q. Now, as far as lead products are concerned, how many factories do you have?

A. One.

Q. Do I understand, then, that all carload shipments of lead products originate in Chicago?

A. Yes.

Q. What is the policy of the Sherwin-Williams Company with respect to shipments to federal or county, municipal, governmental agencies, and agencies connected with those governmental agencies?

A. We ship freight pre-paid on such items.

Q. Why is that?

A. Because government agencies, and so forth, do
3747 not make it a practice to accept freight collect, and therefore, we can't ship it.

Q. Will they or will they not buy on any basis other than a delivery basis?

A. No. They will not, other than on delivery basis.

Q. Is your statement with respect to that policy true irrespective of the quantity involved in the shipment? In other words, does that policy apply to LCL shipments as well as carload shipments on government orders?

A. Yes, sir.

Q. Now, what is the company policy with respect to shipments of lead products to railroads and marine accounts, irrespective of the quantity shipped?

A. We deliver to their closest point of—the closest depot, pick-up depot.

Q. As far as the railroad is concerned, you deliver, or do you deliver to their nearest point on the line or to some other point?

A. To the nearest point on the line.

Q. Is that also true of marine accounts?

A. Yes, sir.

Q. Are there any cities other than Chicago where Sherwin-Williams maintain warehouse stocks for LCL shipments of lead products to purchasers?

A. Yes, there are.

3748 Mr. Welch: Just one second, Your Honor, if I may be off the record for a moment.

Trial Examiner Norwood: Yes, off the record.

(Discussion had off the record.)

Trial Examiner Norwood: On the record. We will have a five-minute recess.

(Recess had.)

Trial Examiner Norwood: Are you ready?

Mr. Welch: Yes.

Trial Examiner Norwood: Proceed.

Mr. Welch: Mr. Examiner, it is stipulated between counsel for the Commission and counsel for the Respondent, Sherwin-Williams Company, that the invoice shown on Commission's Exhibit No. 794-C, as SS Number 4544, erroneously shows that it was shipped from St. Louis, Missouri, to Kansas City, Missouri. An examination of the original invoice indicates that the origin of the shipment was St. Louis, Missouri, and the destination was St. Louis, Missouri.

It is further stipulated that on the same page, to-wit, Commission's Exhibit 794-C, the invoice identified as SL-531, erroneously shows Chicago, Illinois, as the shipping point, and Kansas City, Missouri, as the destination. An examination of the original invoice shows that the origin of shipment was Chicago, Illinois, and destination was St. Louis, Missouri.

3749 It is further stipulated that on examination of another invoice on the same page, to-wit, SL-5462, shows the origin as St. Louis, Missouri, and destination as Kansas City, Missouri. An examination of the original invoice shows that the origin was St. Louis, Missouri, and the destination was St. Louis, Missouri.

It is further stipulated that invoice number NO-29185, which appears on Commission's Exhibit 794-Z, which indicates that the origin of the shipment is Chicago, Illinois, and the destination New Orleans, Louisiana, should show the origin of the shipment was New Orleans, Louisiana, and the destination was New Orleans, Louisiana, by reason of visual inspection of the original invoice.

Is it so stipulated, Mr. Wright?

Mr. Wright: It is so stipulated.

Mr. Welch: It is stipulated between counsel for the Sherwin-Williams Company and counsel for the Commission, that in Commission's Exhibit 790, in the column under D, and opposite the listing "12½ pound kegs," the figure which apparently is "$16.50" should, in fact, be "$13.50."

Mr. Wright: I will agree to that.

Mr. Welch: Mr. Examiner, I will now offer in evidence documents which were identified as Commission's Exhibits 554, 555, 556 and 557. I offer them as Respondent's Exhibits 201, 202, 203 and 204.

3750 Trial Examiner Norwood: Any objection?

Mr. Wright: I would like an opportunity to examine them a moment, Your Honor.

Your Honor, I want to object to this correspondence. The only reason that those papers are a part of a mass of correspondence which the National Lead Company produced under a subpoena duces tecum, and which I didn't offer because they had no relevancy to the issues in this case. They are entirely unrelated matters. Several of the letters are inter-company notes between the branches of the National Lead Company and the head office, but have nothing to do with the question at issue here in Count 1 or Count 2 of the Complaint.

Mr. Welch: You don't question that the authenticity of the document has been established to the Commission?

Mr. Wright: I am not in a position to make a statement about that, because we don't have a transcript showing that portion, and I must reserve an objection on the grounds of improper identification until I have an opportunity to examine it.

Mr. DuBose: On behalf of the National Lead Company I should like also to reserve any objection that we would care to make on grounds that might appear after an examination of the record where they were identified.

I should also like to object particularly to what has been marked Commission's Exhibit No. 554, for identification, the postscript "written in pencil" which may or may not have been identified.

3751

Mr. Welch: You can withdraw that objection.

Mr. Wright: What was the note there that you just erased?

Mr. Welch: I just wrote on that "National Lead."

Mr. DuBose: No, no. I don't mean that. I mean the—

Mr. Welch: You said a note in pencil.

Mr. DuBose: Where it says, "written in pencil—suggested to J. L. R. that we should not supply S-W nor anyone else—" which may or may not have been identified on the record. But I should like to reserve objection until we have a chance to study the record.

Mr. Wright: Counsel certainly hasn't established any purpose of this offer to show any relevancy or materiality of the documents at all, Your Honor.

Trial Examiner Norwood: Let us see what Mr. Welch has to say about their relevancy.

Mr. Welch: As to relevancy?

Trial Examiner Norwood: Yes.

Mr. Welch: We are charged with a conspiracy. I think the contents of the letter will show very definitely action which would ordinarily be incompatible to the conspiracy between National Lead and Sherwin-Williams, when National Lead in correspondence between its own two officers takes the position that Sherwin-Williams would buy National Lead and use them as loss leaders. And we offer them as showing that there is no attempted cohesion between the two companies.

3752

Trial Examiner Norwood: Would you be satisfied with my reserving ruling on this until I can look up the record?

Mr. Welch: Perfectly all right.

Mr. DuBose: Subject to a motion to strike.

Mr. Wright: No, Your Honor, I would like to suggest that these be not admitted until counsel have had an opportunity to further examine the transcript where they were identified.

Trial Examiner Norwood: That is what I said. I will reserve the ruling.

Mr. Wright: All right.

Trial Examiner Norwood: I am reserving ruling.

Mr. Welch: All right.

Trial Examiner Norwood: Proceed.

Mr. Welch: Will you mark these for identification, please?

(The documents referred to were marked Respondents' Exhibits 201, 202, 203 and 204 for identification.)

Mr. Welch: May we be off the record?

Trial Examiner Norwood: Off the record.

3753 (Discussion had off the record.)

Trial Examiner Norwood: We will take a five-minute recess.

(Recess taken.)

Trial Examiner Norwood: You keep those other exhibits in your possession, Mr. Welch.

Mr. Welch: That is correct.

Trial Examiner Norwood: Proceed.

I am reserving ruling on the last offer in evidence of Respondents' Exhibits 201 to 204, inclusive.

Mr. Welch: Your Honor, on yesterday afternoon I asked permission to temporarily take possession of the originals which have been marked as Respondents' Exhibits 197-A through H, inclusive, and Respondents' Exhibits 198-A through H, inclusive. I have now had photostatic copies of those price cards prepared. They have been marked by the reporter with the same basic numbers, and same sub-letters, and I move the substitution of the photostatic copies, and the withdrawal of the original price cards.

Trial Examiner Norwood: Off the record.

(Discussion had off the record.)

Trial Examiner Norwood: Back on the record.

Any objection?

Mr. Wright: I have no objection to that.

Trial Examiner Norwood: That substitution will

3754 be made, and counsel may withdraw the originals and the photostats will now be the original exhibits.

Proceed.

By Mr. Welch:

Q. Mr. Lemke, I show you Respondents' Exhibit 197-A to H, inclusive, and 198-A to H, inclusive, Commission's Exhibits 662-Z-17 and Commission's Exhibit 662-Z-21, and ask you if you recognize the cities named on those respective exhibits as being shipping points, as being all of the cities except those on Pacific Coast in which Sherwin-Williams maintained warehouse stocks of lead products as of the date the price cards composing such exhibits were in effect?

Mr. Wright: Your Honor, may I have the question read?

Trial Examiner Norwood: Read the question.

(Whereupon, the question was read by the reporter.)

Mr. Wright: Your Honor, that is about a sex-tupple-barreled question.

Mr. Welch: It is a perfectly simple question, Your Honor.

Trial Examiner Norwood: Objection overruled.

Does that contain all of those cities except on the West Coast?

The Witness: Your Honor, I believe them to be the location where we had shipping points, or points
3755 where we carried—as I say, shipping points, except those on the west coast.

By Mr. Welch:

Q. As of the dates of the respective price cards?

A. That is right.

Q. And from an examination of all of the exhibits, Respondents' Exhibits 197-A to H, Respondents' Exhibits 198-A to H, Commission's Exhibit 662-Z-17 and 662-Z-21, do they cover all of the divisions of the Sherwin-Williams Company, except Pacific Coast divisions?

A. Yes, I believe they do.

Q. And they cover all of the proved shipping points as of the period of time in those districts with the exception of the Pacific Coast district?

A. Yes, I believe they do.

Q. Now, through your work in auditing the accounts of the various districts, have you audited the accounts of the Pacific Coast district?

A. Yes, we have. Our department has audited all locations of the Sherwin-Williams Company.

Q. As the result of that work, do you know of your own knowledge the cities on the Pacific Coast district where

Sherwin-Williams maintain warehouse stocks of lead products as of the same period of time, to-wit, September 1938, and September 1939?

3756 A. Yes, I do.

Q. Can you name those cities?

A. Spokane, Seattle, Portland, Sacramento, Santa Rosa, Oakland, Los Angeles and Phoenix.

Q. All right.

How are those two groups of cities, that is, those you have just now named as being located on the Pacific Coast, and those that you have referred to from the exhibits that I have enumerated in my previous questions; how are they designated by the company?

A. Points where we carry stock.

Q. Are they designated as shipping points?

A. Yes, sir. As shipping points.

Q. What is the freight policy of Sherwin-Williams as to less than carload shipments to purchasers located in or requesting delivery at any of the designated shipping points consisting of the cities appearing in the exhibits we have referred to and the cities on the Pacific Coast that you have specifically named?

A. We make shipments free of charge.

Q. Throughout your testimony in using the term "carload" and "less than carload", what do you mean?

A. A single shipment of a carload or truckload.

Q. Do I understand that the term "carload," then, applies either to a rail carload or to a truckload?

3757 A. We understand that.

Q. It is used interchangeably, for those two?

A. It is common knowledge.

Q. Now, in connection with your duties of auditing invoices and auditing the books of the division, district and branch offices of Sherwin-Williams, have you ever learned of any other cities which have been accorded the same freight policy with respect to lead products?

A. Yes, I have.

Q. What action, if any, did your office take to ascertain whether such action by your office making the sale on the basis of such policy had been approved by the home office?

A. In situations such as you mentioned there, we checked through our correspondence file at our various sales offices for the purpose of determining whether or not it has their approval as well as approval from headquarters.

Q. Did your office find any such approval was in existence as to some cities?

A. In some locations we have found it.

Q. Do you know, of your own knowledge, how many such cities in addition to those designated as shipping points, to-wit, those referred to and named on the exhibits that we have mentioned, and those that you have named on the Pacific Coast, have been accorded the same freight policy?

A. I beg your pardon. I would like to have that
3758 question repeated.

Trial Examiner Norwood: Read the question.

(Question read by the reporter.)

A. I missed the question. Do you want to know how many; is that the question?

By Mr. Welch:

Q. Yes.

A. Well, approximately, I think, there are five.

Q. Can you name them?

A. Washington, Gadsden, Alabama, Chattanooga, Tennessee, Pensacola, Florida, and San Diego, California.

Q. Is the freight policy of Sherwin-Williams for LCL shipments of lead products to those cities the same as it is with respect to the cities you have named on the Pacific Coast district and those that you have since identified in the exhibits we have been discussing?

A. Yes, they are the same.

Q. Can you tell me what the freight policy is for LCL shipments to all cities other than those which you have named as being shipping points of the Pacific Coast, other than those you have named as having the same freight policy accorded to them, to-wit, Washington, and San Diego, Pensacola, Gadsden and Chattanooga, and other than the cities appearing on the Commission's exhibits we have been referring to?

A. Would you repeat the question?

3759 Mr. Welch: Read the question.

(Question read by the reporter.)

A. Our policy is to ship freight collect.

Q. From what point?

A. From the closest point of shipment.

Q. Do I understand by that that you would mean the closest one of any of the cities that we have named in the three categories?

A. No, from the closest shipping point.

Trial Examiner Norwood: You mean that includes all points except those five cities you mentioned, Washington, Gadsden and Chattanooga—

The Witness: That is right.

By Mr. Welch:

Q. Those would be considered f.o.b. points, but not shipping points for other cities; is that correct?

A. That is right.

Q. Now, are there any exceptions to that policy?

A. Yes. There are exceptions when, because of not having stock at that shipping point, as mentioned in my previous answer, we may ship it from another shipping point.

Q. In that event, what do you do?

A. Well, in that event we ship and equalize the freight with the original or the—that is, the original shipping point from which the customer is accustomed to customarily
3760 draw his stock.

Q. Now, will you explain just how that equalization works?

A. Well, we determine the freight rate from the second shipping point to the—

Q. When you say second shipping point, do you mean the one from which shipment is actually made?

A. Yes, that is right. Thank you. To the first shipping point.

Q. By "first shipping point," do you mean the one which customarily supplies the purchaser?

A. Yes, sir.

Q. All right.

A. We equalize the freight charge for that particular shipment, charging the customer for the difference.

Trial Examiner Norwood: You charge that as if—

The Witness: As if—

Trial Examiner Norwood: —it was shipped from the customer's nearest shipping point; is that right, and if it is shipped from some further shipping point will you adjust that; is that correct?

The Witness: We adjust it.

By Mr. Welch:

Q. Will you give us an illustration?

A. Well, if we shipped from Dallas factory or ware-

house shipping point to a customer in Mississippi—
3761 then we will assume that the customer in Mississippi may be at Meridian, Mississippi—I am only selecting that as a possibility—we would ship directly to Meridian instead of directly to the New Orleans warehouse where there is another shipping point. And we would determine the freight rate between Dallas and New Orleans, and also the freight rate between Dallas and Meridian, and we would charge the customer for the difference between those two rates.

Q. That is, you would charge him the difference in the rate between Dallas and Meridian and Dallas and New Orleans?

Mr. Wright: I object to this, that last question, Your Honor. That was simply a statement by counsel. I think the witness should bring out the testimony.

Trial Examiner Norwood: He is trying to clarify it.

Mr. Wright: The witness should bring out the company policy.

Trial Examiner Norwood: Objection overruled?

Have you answered that question?

The Witness: I am a little bit confused there. Would you repeat the question?

Trial Examiner Norwood: Wouldn't that price be the regular New Orleans price, plus the freight from New Orleans to the consumer, regardless of the fact that it was shipped from Dallas?

3762 The Witness: No.

Mr. Welch: Will you read back the question that I asked the witness, please?

(Question read by the reporter.)

A. Yes.

By Mr. Welch:

Q. Now, why would you make that kind of a shipment in that kind of a situation in the first place?

A. Only because in a situation, as an example, where we may not have the stock at the New Orleans shipping point.

Q. That would be one reason why you would do it?

A. Yes.

Q. Is it or is it not a fact that sometimes, under certain locations, and in view of certain rates, you find that you can avoid a trans-shipment from a smaller warehouse by shipping from some larger warehouse without there being

any increase in the ultimate freight, because the freight from the two warehouses to the ultimate destination is the same?

A. Yes.

Mr. Wright: I object to that question, Your Honor. Is it or is it not a fact? Counsel is testifying here and having the witness ratify his statements. I think the witness should give us his own testimony.

Trial Examiner Norwood: It is a leading question, beyond all doubt.

3763 Mr. Wright: I realize that a certain amount of leading is necessary on this subject, but I believe that question is all out of bounds.

Trial Examiner Norwood: The objection is sustained, and the answer is stricken, and we will take a five-minute recess.

(Recess taken.)

Trial Examiner Norwood: Proceed.

Mr. Welch: Would you read back the last question and answer?

Mr. Wright: No, I believe his last question and the answer were stricken.

Mr. Welch: I am asking him to read back the last one which was answered.

Mr. Wright: Oh, I am sorry.

(Question read by the reporter as follows: "Question: Now, why would you make that kind of a shipment in that kind of a situation in the first place?

"Answer: Only because in a situation, as an example, where we may not have the stock at the New Orleans shipping point.

"Question: That would be one reason why you would do it?

"Answer: Yes.")

By Mr. Welch:

Q. Are there any other reasons?

3764 A. Yes, where we find that the freight rate is near or comparable or less if shipment is made directly to the customer which normally is served, in this particular example, from New Orleans, the shipment in the second case would then be made from Dallas, using the previous example.

Q. And in such a situation as that what freight if any would the customer have to pay?

A. If the rate is less than our rate to the New Orleans warehouse from Dallas to the New Orleans warehouse, then there wouldn't be any charge to the customer.

Q. But if he had received it from New Orleans instead of Dallas, what freight would he have been charged?

A. He would have paid the normal freight rate between New Orleans and destination.

Q. I show you the original of an invoice of a Dallas house copy bearing number 8579, which is one of the sub numbers under Commission's Exhibit—

Mr. Wright: 8579; was that the number?

Mr. Welch: Yes.

Mr. Wright: It appears on Commission's Exhibit 794-T, in line 41.

By Mr. Welch:

Q. (Continuing) —and also a photostatic copy of such document, which is one of the sub numbers under Commission's Exhibit 833—and, off the record, which specific 3765 number I do not have, but having identified the invoice number, you can later found out which sub number under 833 it is, I just don't happen to know right now.

I show you the original of that invoice. Does that illustrate the last type of situation that you discussed?

Mr. Wright: Off the record for a moment.

Trial Examiner Norwood: Off the record.

(Discussion had off the record.)

Trial Examiner Norwood: Back on the record.

By Mr. Welch:

Q. Your answer is—

A. Yes.

Q. From what point would Union, Mississippi, ordinarily be served?

A. New Orleans.

Q. Did you make any investigation as to why in this particular shipment it was shipped from Dallas to Union, Mississippi, rather than from New Orleans?

A. Will you read that question, please?

Trial Examiner Norwood: Read the question.

(Question read by the reporter.)

A. No, I did not.

Q. Are you familiar with the rates between Dallas, Texas, and New Orleans, Louisiana, and between Dallas, Texas, and Union, Mississippi?

3766 A. Yes, I am.

Q. Is that as a result of an investigation conducted?

A. Yes. I checked it.

Q. You checked those rates?

A. Yes, sir.

Q. Will you state what they were?

A. The rate from Dallas to New Orleans is $1.00, and from Dallas to Union, Mississippi, it is $1.10.

Q. To what point?

A. To Union, Mississippi.

Q. It is how much?

A. A dollar ten.

Q. Now, that situation, what freight did the purchaser pay?

A. The Sherwin-Williams paid the freight, the Sherwin-Williams Company paid the freight.

Trial Examiner Norwood: You know the rate from New Orleans to Union, Mississippi?

The Witness: Union, Mississippi?

Trial Examiner Norwood: Yes.

The Witness: Yes, $1.10.

Trial Examiner Norwood: From New Orleans?

By Mr. Welch:

Q. What did you state the rate from Dallas to New Orleans was?

A. I don't quite recall the rates, but I believe that
3767 I was wrong. The rate to New Orleans is $1.10, instead of $1.00.

Q. And the rate from Dallas to Union is how much?

A. ~~It is~~ $1.00 per hundredweight.

Q. Is it $1.00 or $1.09, do you recall?

A. I don't recall that. I think it is $1.00.

Q. Is it less than the rate from Dallas to New Orleans?

A. It is less.

Q. Then in that situation did the purchaser pay any freight whatever?

A. No, he did not.

Q. If he had been shipped from New Orleans to Union, would he have had to pay some freight?

A. Yes, sir.

Trial Examiner Norwood: Well, he would have had to pay that freight, the rate from New Orleans to Union in that case?

The Witness: Yes, he would have.

By Mr. Welch:

Q. But, actually he got it by reason of your substitution of a shipping point without paying any freight, is that right?

A. Yes.

Q. When you are equalizing freight in other types of situations, is it ever possible for the purchaser to pay more as the result of equalization than he would have paid had he been shipped from his normal supply service?

3768 Mr. Wright: May I have that question read?

Trial Examiner Norwood: Read the question.

(Question read by the reporter.)

A. No, it is not.

Q. Why is that true?

A. Because our shipping points are geographically located so that that is impracticable. That situation of that kind would require the second shipping point to be within the radius equal to the original shipping point and the destination.

Q. And in that event it would be the normal shipping point rather than the other point, is that right?

A. Yes, that is right.

Q. Now, are there any exceptions to that freight policy for making LCL shipments to all cities other than those designated as shipping points, and other than those you have named, such as Washington, San Diego, Pensacola, Gadsden and Chattanooga, other than the exceptions which involve equalizations?

A. Yes, there are exceptions.

Q. What type of an exception is that?

A. Well, there are two exceptions.

Q. All right. What are they?

A. Where we make a shipment within the same city where the point—where the warehouse stock is car-

3769 ried. And in those suburbs or contiguous cities which are surrounding the point of shipping city.

Q. How do you describe those suburban cities, or cities that are contiguous to the shipping point center?

A. Well, our terminology is free delivery areas.

Q. Do they vary with each shipping point, depending on the size of the shipping point and the location of the contiguous cities or towns close to it?

A. Yes, it is dependent on that.

Q. Does it follow in each a standard pattern?

A. Yes, it follows a pattern that various companies follow in making deliveries.

Q. Is that a practice that is general throughout other types of industry other than the lead industry?

A. Yes.

Q. Is that a recognized method of handling deliveries?

A. Yes, it is.

Q. Is it commonly followed?

A. Yes.

Q. Now, do any other stores other than those of all the types you have heretofore named, ever make LCL shipments of lead products from their own stocks for which they charge freight from the store to the ultimate destination?

A. Yes, there are a few instances.

Q. Does that happen with any regularity?

3770 A. No.

Q. Have you recently examined the original invoices which are listed on Commission's Exhibit 794-A to 794-Z-13?

A. Yes, I have.

Q. Have you seen any tabulation which lists certain information appearing on the face of such exhibits in the same order and sequence as which those invoices are listed in Commission's Exhibit 794 with sub numbers?

A. Yes, I have.

Mr. Welch: I would like to have the documents that I now hand to the reporter, consisting of pages 1 to 23, marked, with appropriate sub numbers, as Respondents' Exhibit 205. And may we take a moment or two while he is doing that?

Trial Examiner Norwood: Yes. We will have a five-minute recess.

(Recess had.)

Trial Examiner Norwood: Proceed.

(The papers referred to were marked Respondents' Exhibit 205-A, 205-B, 205-C, 205-D, 205-E, 205-F, 205-G, 205-H, 205-I, 205-J, 205-K, 205-L, 205-M, 205-N, 205-O, 205-P, 205-Q, 205-R, 205-S, 205-T, 205-U, 205-V, 205-W, and X, for identification.)

By Mr. Welch:

Q. I show you the documents which have been
3771 identified as Respondents' Exhibit 205-A through 205-W, for identification. Is that the tabulation that you referred to in your previous answer?

A. Yes.

Q. To what extent, if any, have you verified the accuracy of such tabulation against the original invoices?

A. I checked all the invoices against this tabulation.

Mr. Welch: I now offer in evidence Respondents' Exhibit 205-A to 205-W, for identification.

Mr. Wright: Who prepared this exhibit, Mr. Lemke?

The Witness: One of our office people prepared the list.

Mr. Wright: What were his instructions?

The Witness: Well, to list the name of the customer and the order number, the origin of the shipment, the destination, and then anything relative to identifying as to the method of shipment, as far as it pertains to freight collect, or freight pre-paid, and so forth.

Mr. Wright: In other words, it purports to contain everything that appears in the invoice?

The Witness: So far as it pertains to the subject of identification as to the method of shipment pertaining to freight.

Mr. Wright: Was it prepared under your direction?

The Witness: Yes, sir.

3772 Mr. Wright: And this includes all of the invoices then listed in Commission's Exhibit 794 and the sub numbers?

The Witness: There are a few exceptions, and they are—and we marked them missing.

Mr. Wright: In so far as the other invoices, your followed the same order?

The Witness: Yes, sir.

Mr. Wright: Your Honor, I have no objection to this document. Of course, subject to my right to inspect the original documents and the information which was pulled off and put into this tabulation.

Mr. Welch: Those documents are available for inspection here this morning.

Trial Examiner Norwood: They may be received.

(The papers referred to, heretofore marked for identification RESPONDENTS' EXHIBIT 205-A, 205-B, 205-C, 205-D, 205-E, 205-F, 205-G, 205-H, 205-I, 205-J, 205-K, 205-L, 205-M, 205-N, 205-O, 205-P, 205-Q, 205-R, 205-S, 205-T, 205-U, 205-V, and 205-W and X, were received in evidence.)

By Mr. Welch:

Q. Perhaps Mr. Wright has already asked you this question, but I would like to ask it myself:

What information is shown on this tabulation?

A. The customer's name, the invoice number, the
3773 origin of shipment, the destination and the marking so far as it pertains to, identifying as to how the shipment was made with respect to freight, that is collect, prepaid, and so forth.

Q. And the listings of the invoices in Respondents' Exhibit 205-A to W, are in the same order as they appear in Commission's Exhibit 794-A to Z, is that right?

A. Yes, they are.

Mr. Welch: Your Honor, off the record.

Trial Examiner Norwood: Off the record.

(Discussion had off the record.)

Trial Examiner Norwood: Back on the record.

By Mr. Welch:

Q. Now, I notice that under the column "marking" you sometimes have a notation "Free delivery area." From where was that information obtained?

A. From the attachments that were attached to the original invoices, shipping copy.

Q. Do you know what the purpose and reason was for which those attachments were first prepared and attached to the invoices?

A. Yes, I do.

Q. Will you state what it was?

A. For the purpose of identifying these original shipments as to the various classifications listed.

Q. Was it for the purpose of supplying specific information that the Federal Trade Commission had re-
3774 quested in connection with the tabulation which has now been admitted into evidence as Commission's Exhibit 794?

A. Yes.

Q. Will you explain the meaning of the term "will call" as it is used in the column headed "Marking"?

A. A customer stopping at one of our stock points or shipping points where we carry stock for the purpose of picking up the merchandise personally, or by someone in his employ.

Q. What is meant by the term "Caller"?

A. Approximately the same thing. An individual, either the man, the purchaser himself, or someone whom he has identified to do this for him.

Q. What is meant by the term "Wait"?

A. Approximately the same as my previous answers.

Q. Now, when those terms are used, what does that indicate as to whether there was any freight involved in the shipment at all?

A. No freight charged.

Q. Do you mean no freight charged or no freight incurred by either party?

A. No freight incurred either by Sherwin-Williams Company or by the buyer.

Q. Now, what does the term "C. L." mean wherever it appears on that tabulation?

3775 A. It has reference to identification on the original invoices, including truckload and carload.

Q. The term, therefore, applies equally to truckload and carload?

A. Yes.

Q. What does the term "Pt. C. L." mean?

A. Part carload.

Q. When there is no entry in the column headed "Marking" opposite a particular invoice, does that indicate anything to you?

A. Yes, it would indicate that—one of three situations.

Q. All right, will you enumerate them?

A. Shipment made on the collect basis, or a shipment—

Q. Just one second. Will you pick out one of those?

A. Shipment made on a collect basis?

Q. On a collect basis.

A. On Exhibit R-205-C, number 9642, origin of the order was Los Angeles, destination Las Vegas, Nevada.

Q. And there is no notation?

A. No notation.

Q. What does that mean to you in that particular situation?

A. That it was shipped on a collect basis.

Mr. DuBose: On a what basis?

The Witness: Collect basis.

Q. What is the second type of situation that would 3776 be brought to your mind by the absence of any data in the column headed "Marking"?

A. A delivery made within a shipping point city.

Q. Can you illustrate that type of situation?

A. On Exhibit R-205-A, Invoice No. 5322, Kansas City, Missouri, to Kansas City, Missouri.

Q. And when there is no marking in that type of situation, it indicates what?

A. That it was shipped at Sherwin-Williams' expense, delivered locally by cartage or through the medium of their own truck.

Q. All right. What other type of situation would be brought to your mind by the absence of a marking?

A. Deliveries made to cities contiguous to the shipping point.

Q. Will you illustrate that type of situation?

A. On R-205-C, Invoice No. 9768—I am sorry, I checked the wrong one there.

Q. All right.

A. I didn't look at the marking. Do you want one without marking?

Q. That is right.

In framing my last question, in saying without marking, I mean without marking on the invoices itself, not without marking on the attachments that you have referred to.

Will you identify that one?

3777 A. In that case, on R-205-H, Invoice 39516, origin Oakland, destination Berkley.

Q. Do you know of your own knowledge whether Berkley is in a free delivery area for Oakland?

A. Yes, I do.

Q. Now, leaving that tabulation for a moment, do you know the customary method by which Sherwin-Williams ships its products including lead products to its own stores in so far as carload or less than carload shipments are concerned?

A. We require our stores to order in carload quantities.

Mr. Welch: Your Honor, may we be off the record for a moment?

Trial Examiner Norwood: Off the record.

(Discussion had off the record.)

Trial Examiner Norwood: On the record.

We will recess at this time until 1:30.

(Whereupon, at 12:00 o'clock, Noon, the hearing was adjourned until 1:30 o'clock, p. m.)

3778 **Afternoon Session.**

1:30 p. m.

Trial Examiner Norwood: Proceed, Mr. Welch.

H. C. LEMKE resumed the stand and testified further as follows:

Direct Examination (Continued).

Mr. Welch: Yesterday on page 3827 of the record, counsel for the Commission stated as follows: "Your Honor, at this point, if this document is received, I want to call on Respondents to produce the list of rates and references from which this document is made up," referring to two maps which are Respondents' Exhibit 199 and Respondents' Exhibit 200.

I now wish to hand to counsel for the Commission three sets of tabulations which include the rate applicable at the various points marked on the maps and which have appropriate reference to the tariffs from which the rates were obtained, there being three sets applicable to each map.

Mr. Wright: I want to thank counsel for supplying this information. I want to point out my understanding of the state of the record was that I was to have a sufficient time for examination of these documents before deciding on whether the witness who testified as to the maps
3779 should be recalled for further cross-examination.

Trial Examiner Norwood: Yes.

Mr. Welch: The length of time that counsel has for that purpose is something within the discretion of the Examiner and over which we have no control.

Trial Examiner Norwood: You would be able to cross-examine tomorrow, wouldn't you?

Mr. Wright: I don't see how that is possible, sir. This data here must run some 30 pages, tariff references and rates. I understand we are to run late here today, and I have no facilities for examining this material or these tariffs which are referred to are not available to me.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record. I will ask

counsel to see what he can do with it overnight, and I hope it can be managed so that we will not have to have a return trip to Cleveland for cross-examining that witness.

Mr. Wright: I appreciate that consideration, your Honor. I will do my best.

Trial Examiner Norwood: Yes.

Mr. Wright: I have no optimism about being able to check this material overnight.

Trial Examiner Norwood: See what you can do.

3780 Proceed.

By Mr. Welch:

Q. I show you an original invoice from Oklahoma City which carries the number 3453, which appears on Commission's Exhibit 794-C and which is one of the sub numbers on Commission's Exhibit 833. I also show you an Oklahoma City house copy invoice issued by Sherwin-Williams Company, No. 3552, bearing date of January 16, 1943. I am showing you both of those exhibits and I want you to state whether the notation on Invoice No. 3453 that the products covered on that invoice were to be shipped prepaid and without recovery of the freight by Sherwin-Williams was in accordance with Sherwin-Williams' policy or not.

A. It was not in accordance with Sherwin-Williams' policy, inasmuch as the order was shipped prepaid.

Q. Why do you say that?

A. Oklahoma City is a shipping point. Destination on this particular order is to Ralston, Oklahoma. Therefore, we have no basis from our policy standpoint to ship that order.

Q. You are referring to No. 3453?

A. Yes.

Q. What condition exists on 3552 as to freight charges?

A. On 3552, we charge customers the prepaid freight charges.

3781 Q. That means the customer pays?

A. Yes.

Q. Is 3552 in accordance with Sherwin-Williams' freight policy?

A. Yes, it would fall in line with Sherwin-Williams' policy.

Mr. Wright: Your Honor, I am going to move to strike that testimony with regard to invoice referred to as 3552 unless counsel is prepared to offer that invoice in evidence.

It is not recorded in any previous exhibit and the testimony was about an exhibit which does not appear in the record.

Mr. Welch: We are perfectly willing to offer it.

Trial Examiner Norwood: Do you offer it?

Mr. Welch: Yes.

Trial Examiner Norwood: Mark it Respondents' Exhibit 206.

(The document referred to was marked Respondents' Exhibit 206 for identification.)

Mr. Welch: I will withdraw it to make a photostatic copy.

Mr. Wright: That is perfectly all right.

Mr. Welch: I would like that to be numbered 206-A. If I may—there will undoubtedly in the course of this examination be others and they may be carried under—

3782 Trial Examiner Norwood: (Interposing.) I think that will confuse us unless you have them here now.

Mr. Welch: Your Honor, I have them here, but as I continue this examination, there are going to be different invoices I am going to produce.

Trial Examiner Norwood: Why don't you have them all marked now and examine him on them?

Mr. Welch: Your Honor, I am doing so as fast as I can get to them. They will all be numbered with a sub letter, the other following other immediately.

Trial Examiner Norwood: Mark it 206 and show it received.

(The document referred to, heretofore marked RESPONDENTS' EXHIBIT 206, was received in evidence.)

Trial Examiner Norwood: Proceed.

You did not have any objection, did you, Mr. Wright?

Mr. Welch: I understood it was being offered at Mr. Wright's request.

Mr. Wright: I have no objection.

Trial Examiner Norwood: It has been received.

By Mr. Welch:

Q. I now call your attention to Respondents' Exhibit 205-B and the invoice carries No. 3508 and 6368, and the notation under the column "Marking" is written
3783 "prepaid," with the destination being indicated as Alexandria, Virginia. Will you tell us why, within the policy of the company, those shipments were made prepaid?

A. Washington is one of those cities which I mentioned this morning as being an f.o.b. point, and Alexandria is a suburban city of Washington, and is considered a free delivery area.

Q. Is Alexandria recognized consistently as such by the company?

A. Yes.

Q. I now refer, on the same page, to Respondents' Exhibit 205-B, to invoice 10611, where the origin is shown as Philadelphia, Pennsylvania, the destination Marlton, New Jersey, and no marks in the marking column. What was the freight situation on that invoice, based upon that information?

A. May I see the copy of the invoice?

Q. I show you Philadelphia house copy bearing No. 10611.

A. That shipment is a collect shipment.

Q. Why do you state that?

A. Because it is not indicated as any other way of handling.

Q. Is there any notation on that to the effect that you paid the freight?

A. No, sir.

Q. I call your attention to the red pencil writing 3784 and ask you the same question.

A. Oh yes; it says, "Paid by customer," which would place it in record of what I stated before, that it was shipped collect.

Trial Examiner Norwood: Let's take a five-minute recess.

(Short recess.)

Trial Examiner Norwood: Come to order, gentlemen. Proceed.

By Mr. Welch:

Q. Mr. Lemke, since Respondents' Exhibit 205-A to W, inclusive, was put in evidence, have you placed any additional marks thereon?

A. Yes, I have.

Q. Will you explain what you have done?

A. I have taken those items which have not been identified in the column headed "Marking" and determined—let me say I have classified those into three groups.

Q. What are the three groups?

A. Local city delivery, marked by "A", and free de-

livery area for shipping point, marked "B", and prepaid and recovered or collect freight, marked "C".

Q. Now then, on the tabulations themselves, have you inserted another column headed, "Code"?

A. Yes.

3785 Q. And what entries have you made in that column?

A. I have made the—I have used either the letters A, B, or C.

Q. And to which invoices?

A. As to those invoices which do not have an identification in the column headed by the word "Marking."

Q. As to those that are marked B throughout the entire exhibit, beginning with Respondents' Exhibit 205-A, and running through 205-W, do you know of your own knowledge that the towns therein listed to which shipments were made from the points of origin therein listed were in fact within the free delivery zones of such shipping points?

A. Yes.

Q. Do you know of your own knowledge and from your examination of the original invoices which you have classified by the code letter C, that they fall within the scope of the policy you have previously stated to the effect that in such instances the freight would either be prepaid and then collected from the customer, or else the shipment would be sent out freight collect?

A. Yes.

Q. Now, Mr. Lemke, I call your attention to two invoices appearing on Respondents' Exhibit 205-F, the same bearing the numbers 4012 and 4030.

A. All right.

3786 Q. I would like to have you examine the original invoices which I hand you and tell me whether or not carload shipments are involved.

A. These two orders were shipped at the same time, evidenced by the shipping receipt number which is the same in both cases, No. 52336.

Q. Is the poundage shown on both?

A. Yes.

Q. Which one is shown and what is the total amount shown?

A. On Invoice No. 4012, the total poundage represents approximately 76,000 pounds.

Q. Is that information shown on the first page of No. 4012?

A. Yes.

Q. And the fact that the same shipping receipt number is on both invoices indicates that they went together as a part of a truckload order?

A. Yes, sir.

Mr. Welch: May we go off the record?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

By Mr. Welch:

Q. I now show you invoices bearing Nos. 3233 and 3260, which appear on Respondents' Exhibit 205-F.

3787 Can you examine the first sheets of Order No. 3260 and Order No. 3233, and explain the fact that No. 3233 was billed f. o. b. Oswego?

A. Invoice 3233 specifically indicates that the shipment was made prepaid, or f. o. b. Oswego.

Q. Now, look at 3260. Which of those two orders reflects the true policy of the Sherwin-Williams Company with reference to freight payment in a situation of that character?

A. Invoice 3260.

Q. Do I understand from that that the billing of 3233 is an error?

A. I would consider it such. It is not Sherwin-Williams' policy to ship that way.

Trial Examiner Norwood: That first one, 3233, was prepaid and recovered, wasn't it?

The Witness: No, there is no showing of recovery.

Mr. Welch: I would like to have 3233 marked as Respondents' Exhibit 207, and the first page of No. 3260 marked Respondents' Exhibit 208. And I would like to offer them both in evidence.

Mr. Wright: Are you offering this note that appears on here in red?

Mr. Welch: I know nothing about it.

Trial Examiner Norwood: Is there any objection?

Mr. Wright: No objection.

Trial Examiner Norwood: Received as marked.

3788 (The documents referred to were marked for identification RESPONDENTS' EXHIBIT 207 and RESPONDENTS' EXHIBIT 208 and were received in evidence.)

By Mr. Welch:

Q. I now call your attention to Invoice No. 7948 and No. 7966 on page 205-F, involving shipments from Newark to the Bronx, and to New York, respectively. Do you know whether the Bronx and New York are both or either within the free delivery area from Newark?

A. They are both in the free delivery area.

Q. I now call your attention to Invoice No. 9555 appearing on Respondents' Exhibit 205-G, and I show you the original invoice listed thereon. Can you tell us whether or not that involves a carload shipment?

A. It does involve a carload shipment.

Mr. Welch: Off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

By Mr. Welch:

Q. What is your basis for stating that that is a carload shipment?

A. The quantity through the weight indicated on the face of the invoice, plus the fact that a good number of the items are canceled, which together would make up
3789 a required carload weight. Therefore, we would ship it to the customer.

Q. I now call your attention to Invoice No. 14939, No. 14936, and No. 14938 appearing on Respondents' Exhibit 205-G. Can you tell us whether those shipments involve carload shipments?

A. Yes.

Q. What is the basis for that statement?

A. The weight and the fact that all three orders were shipped on the same bill of lading number.

Q. What is the approximate total weight shown, just roughly?

A. Approximately 17,000 pounds.

Q. 17,000 pounds?

A. Yes.

Trial Examiner Norwood: Three shipments together make up a carload, is that the idea?

The Witness: That is right.

By Mr. Welch:

Q. Do the faces of those invoices indicate certain other invoices were shipped at the same time on the same shipping receipt?

A. Yes. In addition to this weight indicated on the face of the invoices, we have a notation that 14929 indicates it was shipped on other invoices in addition to the 14936 and 14938.

3790 Q. Which invoices are not in the possession of the Cleveland office, are they?

A. No.

Q. I now call your attention to Invoice No. 38336 appearing on Respondents' Exhibit 205-G and show you an original invoice and ask whether that shipment involved a carload shipment?

A Yes.

Q. What is your basis for making that statement?

A. The weight indicated on the face of the invoice.

Q. What is the rough weight?

A. Approximately 18,000 pounds.

Q. I call your attention to the notation with reference to Invoice No. 46019 appearing on Respondents' Exhibit 205-H. What relationship if any does Burlingame bear to Oakland, California?

A. Burlingame is in the free delivery area.

Q. I call your attention to Invoice 4838 appearing on Respondents' Exhibit 205-K. I will show you the original of that invoice.

Mr. Welch: The document now marked Respondents' Exhibit 205-H should be changed to read Respondents' Exhibit 205-H-1.

Trial Examiner Norwood: There is nothing on the record about these letters. All you have got to do is

3791 change the letters there. You haven't asked any questions about it.

Mr. Welch: We have offered the whole thing, your Honor.

I don't want to change my total sequence of numbers because I have been referring to the entire document.

Off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. Welch: H shall become H-1 and the one that was unnumbered will become H-2.

Trial Examiner Norwood: Change those numbers, Mr. Reporter, when you get down to H. Page No. 7 is H, and mark the ones after No. 7, beginning with I. Page No. 8

is I, and so forth, which makes the entire series concluded with the letter X.

Take five minutes recess and fix them up.

(Short recess.)

Trial Examiner Norwood: The record may show that this series, Respondents' Exhibits 205 run from "A" to "X" inclusive instead of "A" to "W" as heretofore designated, and that references to that may be corrected to include "X".

By Mr. Welch:

Q. Now, I note that normally that Invoice No. 4838 3792 to which I have called your attention indicates that there was no marking thereon with reference to freight, I show you the original Invoice No. 4838 and ask you what the facts are with reference to who paid the freight and why?

A. The invoice indicates that the Sherwin-Williams Company paid the freight.

Q. Why?

A. Because the shipment was made to a shipping point.

Q. I now call your attention to invoices No. 14767 and 48255 appearing on Respond ts' Exhibit 205-L and note that the column headed "Mar..ing" does not have a notation as to who paid the freight. I show you the original invoices No. 14767, and 48255, and ask you if you have made any investigation as to who paid the freight, and if you made such an investigation, who paid it?

A. It appears that when we have to pay the freight on both of these invoices, inasmuch as they are government agency orders.

Q. That would be in conformance with your general policy?

A. Yes.

Q. I call your attention to Invoices No. 48260 appearing on Respondents' Exhibit 205-L, and note in the column headed "Marking" the words "entire amount returned." I show you the invoice. What is the meaning of the writing "entire amount returned"?

3793 A. It appears that the shipment was either not acceptable to the customer and he returned it, or it was shipped in error, so the merchandise was returned to the shipping point.

Q. The entire amount of merchandise was returned, is that right?

A. Yes, the entire amount.

Q. Now, when situations like that happen, what is the company's policy with reference to freight?

A. Our policy is to adjust the original freight charge.

Q. And by adjust, you mean what?

A. Credit the customer for the amount he paid on the original shipment.

Q. I call your attention to Invoice No. 1090 on Respondents' Exhibit 205-L, and the absence of any notation in the column headed "Marking." I show you the original invoice No. 1090 and ask you what the freight situation was with reference to that invoice in so far as payments are concerned?

A. This shipment appears to be a carload quantity, therefore, it was prepaid.

Q. Why is there no prepayment notation on it?

A. Because the shipment, as indicated by the shipping statement, shows that it originated at Oakland, and was shipped by boat to Seattle, where it was reconsigned
3794 to customer as verified by the shipping statement at the Seattle warehouse.

Q. And Seattle is a warehouse point?

A. Yes, sir.

Q. Who paid the freight on that invoice after it was trans-shipped from Seattle to the customer at Hoquiam, Washington?

A. It would appear that this would be shipped at Sherwin-Williams freight expense because of the quantity involved, representing 19,024 pounds.

Q. Now, I call your attention to Invoice No. 12182 shown on Respondents' Exhibit 205-N and the fact that there is no notation in the column headed "Marking." I show you the original invoice and ask you what the invoice shows with reference to who paid the freight and why?

A. The Sherwin-Williams Company paid the freight on this shipment which originated at Kensington, or Chicago factory, and was shipped direct to the Seattle warehouse or shipping point where it was re-consigned to the customer. The quantity in this case, from the standpoint of weight, would indicate that the Sherwin-Williams Company also paid the freight from Seattle to Yakima, Washington.

Q. It being a carload?
A. It being a carload.
Trial Examiner Norwood: Did that ultimately
3795 amount to more than the price from Chicago to Seattle?
The Witness: Would you repeat that, please?
Trial Examiner Norwood: Can you tell us whether the freight from Chicago to Yakima, Washington, was more than from Chicago to Seattle?
The Witness: Yes, very much more.
Trial Examiner Norwood: Go ahead.

By Mr. Welch:

Q. Mr. Lemke—
Mr. Welch: Your Honor, I would like to state for the record, however, that this freight equalization is not a problem in connection with this invoice because the freight was paid from origin to destination and there was no equalization involved. We are offering to show that.
Trial Examiner Norwood: Very well.

By Mr. Welch:

Q. I now call your attention to Invoice No. 7968, appearing on Respondents' Exhibit 205-M, and call your attention to the fact that the column headed "Marking" bears no notation. I would like for you to examine the original invoice and tell me what the size of it was, who paid the freight and why.
A. The weight of this shipment was 19,835 pounds. The invoice indicates "Car to Seattle." Therefore, it appears that the shipment was made from Oakland to our
3796 Seattle warehouse and re-consigned to Anchorage. Sherwin-Williams paid the freight.
Trial Examiner Norwood: Is that Anchorage, Alaska?
The Witness: Yes.

By Mr. Welch:

Q. Now, I would like to call your attention—still referring to Respondents' Exhibit 205-M. I note that Invoice No. 8323 has as its place of origin Seattle, and its destination Juneau, Alaska, and has no marking in the column, and no code letter in the column headed "Code." Is that correct or incorrect?
A. I would have to refer to the original invoice.
Q. Is Seattle the closest shipping point to Juneau?

A. Yes, it will appear that this order was shipped collect to Juneau, Alaska.

Q. Did it amount to a carload?

A. I don't think so.

Q. I now call your attention to Respondents' Exhibit 205-C, an invoice No. 4393 which shows a sale to the Columbus & Greenvill Company, of Columbus, Mississippi, which delivery was f.o.b. Chicago. Do you have any knowledge as to whether Columbus and Greenvill Railway Company is connected with the Gulf, Mobile and Ohio, and the Alton route?

A. Yes, and they have a line.

3797 Q. The Gulf, Mobile and Ohio, and the Alton Route, have a terminal at Chicago, is that right?

A. Yes, they do.

Q. Then, does the delivery of the merchandise to the railroad f.o.b. Chicago conform to Sherwin-Williams' policy for handling railroad accounts?

A. Yes.

Q. I now call your attention to Respondents' Exhibit 205-P, Invoice 4955, showing a shipment from Dallas to Panama City, bearing the marking indicating that the shipment was f.o.b. Panama City. Please examine the original invoice and tell me whether that constituted a carload, and if it did, the basis for your statement.

A. It constitutes a carload.

Q. What poundage do you find on the first page of the invoice?

A. Approximately 21,000 pounds.

Q. I call your attention to the entry in connection with Invoice 9800 on Respondents' Exhibit 205-P, involving a shipment from Houston, Texas, to Baton; what relation exists between Baton and Houston?

A. Baton is in the freight delivery area.

Q. Now, I call your attention to Respondents' Exhibit 205-R, and the Invoice No. 7320. I will ask you to look at the second tabulation. On that page, and tell me

3798 what the invoice number is?

A. 7225.

Q. I now show you an invoice bearing the number 7325. I will ask you to say whether the one you have listed as 7225 is the same as the one, the original of which I showed you?

A. It appears it should be 7325 instead of 7225.

Q. You show it 7325. Will you make appropriate corrections on Respondents' Exhibit 205, with the consent of the Commission's counsel, to make that conform?

A. Yes, sir.

Q. Now, with respect to that exhibit, I note that the marking shows that freight was allowed to destination on that shipment. I show you the original invoice 7325 and ask you to explain why freight was allowed?

A. It appears that an original shipment was entered and shipped indicating on the face of the invoice, "A truck will call with other orders," and it appears that it is the back order, or carried forward items which we shipped.

Q. Do I understand by that that they were not available for shipment at the time the truck picked up the other items?

A. It would appear so.

Q. Now, in a situation where the company is not in a position to ship all items in connection with a carload order at the time the carload order goes out, what is the company's standard policy?

3799 A. Sherwin-Williams pays the freight.

Q. Why is that?

A. Because it would be a direct additional cost to the customer, and we assume it is our responsibility to have the merchandise on hand to be handled with the original order.

Q. In other words, you don't want to penalize them?

A. That is right.

Q. I now show you Invoice No. 11232 appearing on Respondents' Exhibit 205-R. You will note that the statement under the column "Marking" is "Freight allowed to destination." Can you state from an examination of the invoice why that price was allowed to destination?

A. It would appear that this is a carload shipment.

Q. And under such policy, who would pay the freight?

A. Sherwin-Williams would pay the freight.

Q. What is the weight?

A. It is—

Q. Roughly.

A. I think that was approximately 12,000 pounds as indicated. However, to make positive the weight, I would want to estimate the number of gallons because the actual weight doesn't appear to be given in complete picture, but so far as the notations are concerned—

Q. Could you do that in a very few minutes?

A. Yes.

3800 Mr. Welch: Your Honor, we would like a few minutes' recess to figure that out.

Trial Examiner Norwood: Very well.

(Short recess.)

Trial Examiner Norwood: Come to order, gentlemen, and proceed.

By Mr. Welch:

Q. Are you now able to calculate that figure, roughly?

A. Approximately 16,000.

Q. Does the company occasionally take a carload rate even though there isn't sufficient tonnage in it to make a carload?

A. Yes, we do.

Q. Why is that?

A. There are occasions in certain circumstances when it is less expensive, or there is less freight charge to the company by paying the minimum carload order and shipping less than the minimum quantity than shipping that portion on an LCL basis.

Q. Would an amount of 16,000 pounds fall in that area?

A. Yes, it would.

Q. Mr. Lemke, have there ever been changes in the li t of cities in which warehouses or shipping points are operated?

A. I wish you would repeat that question.

Q. Strike the question.

3801 Mr. Lemke, are certain cities sometimes listed as shipping points because warehouse stocks are carried there, and at other times not listed because they do not carry warehouse stocks?

A. Yes.

Q. Is Atlanta, Georgia, a city that has been in that position—Savannah, Georgia, I mean?

A. Yes, Savannah has.

Q. Was Savannah, Georgia, a warehouse—strike that. Was Savannah a shipping point during the period from September 1942, through April 1943?

A. What was the first date?

Q. September 1942. Correction, October 1942.

A. Yes, I think it was.

Q. I call your attention to Invoice No. 8373 appearing

on Respondents' Exhibit 205-R, and show you the original invoice. I call your attention to the fact that the notation in the column headed "Marking" is prepaid. Can you tell me why that shipment was prepaid?

A. Because it was a carload shipment.

Q. How much poundage was involved?

A. 22,690 pounds.

Q. How much?

A. 22,860 pounds.

Q. I call your attention to Invoice No. 7200 on
3802 Respondents' Exhibit 205-R, and note that the column headed "Marking" bears the notation "Freight allowed to destination." Can you explain to me upon examination of the original invoice why that shipment was sent freight allowed?

A. There appears to be a carload order.

Q. What is the poundage involved, roughly?

A. Approximately 20,000 pounds.

Q. I now call your attention to Invoice No. 8525 appearing on Respondents' Exhibit 205-R and show you the original invoice. I call your attention to the note appearing under the column "Marking" which is "Prepaid." Can you tell us why that shipment was prepaid?

A. Carload.

Q. What is the tonnage involved?

A. 19,662.

Q. You mean pounds?

A. Yes.

Q. I call your attention to Respondents' Exhibit 205-U and the Invoice No. 8111 showing origin, Chicago, destination, Gary, Indiana. What relation exists between Chicago and Gary?

A. Gary is in a free delivery area.

Q. I now call your attention to Respondents' Exhibit 205-V and Invoice No. 1473 showing the place of origin as
Pittsburgh, Pennsylvania, and destination as Home-
3803 stead, Pennsylvania. What relationship exists between Pittsburgh, Pennsylvania, and Homestead, Pennsylvania?

A. Free delivery area.

Q. I show you Invoice 49923 appearing on Respondent's Exhibit 205-W, and I call your attention to the fact that the column headed "Marking" bears a notation "Prepaid." Will you examine the original invoice and tell us why the shipment was sent prepaid?

A. Carload.

Q. How much poundage was involved?

A. Approximately 18,000 pounds.

Q. Would that come within the range with which the company would prepay—would prefer to pay the minimum car rate, rather than the less than car rate?

A. Yes.

Mr. Welch: We think we are finished with this witness, Your Honor, but it is our thought that we may want to ask him some questions tomorrow. Due to the lateness of the hour, we would like to state that we would like an adjournment until tomorrow morning, but we will advise counsel for the Commission that in all probability the witness will be offered for cross-examination immediately upon the convening of the session tomorrow morning.

We also would like to state for the record that we will take temporary possession of Respondents' Exhibits 3804 Nos. 206, 207, and 208 for the purpose of making photostatic copies.

Trial Examiner Norwood: Very well, Mr. Welch.

We will recess now until 10:00 o'clock tomorrow morning.

(Whereupon, at 4:55 o'clock, p. m., October 16, 1947, the hearing in the above-entitled matter was adjourned.)

3805 Room 125, Federal Building,
Cleveland, Ohio,
Friday, October 17, 1947.

Met, pursuant to adjournment, at 10:00 a. m.

Before:

John W. Norwood, Trial Examiner.

Appearances:

Joseph Wright, (and)
David R. Reel, Attorneys for the Federal Trade Commission.

J. T. Welch, (Davies, Richberg, Beebe, Busick and Richardson, Esqr's., 15th Street, N. W., Washington, D. C.), and
J. T. McDowell, (and)
T. J. Gray, (101 Prospect Avenue, Cleveland, Ohio), Attorneys for Sherwin-Williams Company.

Edmund P. Wood, Attorney for Eagle-Picher Lead Company, and The Eagle-Picher Sales Company.

Eugene Z. DuBose, (Alexander and Green, 120 Broadway, New York, New York), for the National Lead Company.

3806 John A. Duncan, (M. B. & H. H. Johnson, 1649 Union Commerce Building, Cleveland, Ohio), Attorney for The Glidden Company.

3807 PROCEEDINGS.

Trial Examiner Norwood: Pursuant to adjournment, the hearing is resumed in Room 125 of the Federal Post Office Building, Cleveland, Ohio, at 10 o'clock A. M.

The appearances are as follows:

J. T. Welch and T. J. McDowell and T. J. Gray, Attorneys for Sherwin-Williams Company.

Edmund P. Wood, Attorney for Eagle-Picher Company and the Eagle-Picher Sales Company.

John A. Duncan, Attorney for The Glidden Company.

Eugene Z. DuBose, Attorney for National Lead Company.

The attorneys for the Federal Trade Commission are Joseph S. Wright and David R. Reel.

Trial Examiner Norwood: Mr. Lemke will resume the stand for further examination.

H. C. LEMKE resumed the stand and testified further as follows:

Direct Examination (Continued) by Mr. Welch.

Q. Mr. Lemke, the testimony yesterday, you testified at length as to the policy of the Sherwin-Williams Company, with reference to handling carload and less than carload shipments to various types of purchasers. As a general policy that you described in your testimony yester-
3808 day—has it been the same over a period of 15 years?

A. Yes.

Q. The policy you described yesterday does—does it or does it not represent a departure from the policy you have maintained for 15 years?

A. It does not represent any departure.

Q. I now call your attention to Invoice No. 13050 which appears on Respondents' Exhibit 205-C, Invoice No. 2094 which appears on Respondents' Exhibit 205-D, Sherwin-Williams Invoice No. 14091 which appears on Respondents' Exhibit 205-D, and Sherwin-Williams Invoice No. 4060 which appears on Respondents' Exhibit 205-E, and I will call your attention to the notations appearing opposite each of the invoices I have referred to. The notation in each instance is either "Prepaid, freight allowed," or "Freight allowed," in the column headed, "Marking," and all of the invoices involving shipments to the Pusner paint store at Tucson, Arizona. Will you please explain why those shipments were sent prepaid or with freight allowed? Correction—will you strike that question?

When those—correction. Have you made any investigation and obtained reports as to why those particular shipments were sent either freight prepaid or freight allowed?

A. Yes, I have.

3809 Q. Tell us the result of that investigation and of those reports.

A. I learned that because of competition, these particular orders were shipped to Pusner on the basis of freight allowed.

Q. What was the competitive situation that made that necessary?

A. Well, I found that the company set up that policy at Tucson, selling customers there on the same basis.

Q. That is a competitor of Sherwin-Williams Company?

A. Yes.

Q. And how did that affect Sherwin-Williams' relationship with Pusner?

A. That we couldn't sell them on the regular Sherwin-Williams basis of freight collect which is our regular policy.

Q. Then when you found that you couldn't ship them on the regular basis, did you have to make any concession?

A. Yes.

Q. What was that concession?

A. We allowed the freight.

Q. I now show you Sherwin-Williams Invoice No. 657 which appears on Respondents' Exhibit 205-D and call your attention to the notation in the column headed "Marking" which reads, "Freight allowed;" did you con-
3810 duct any investigation and receive any report as to why freight was allowed on that particular invoice?

A. Yes. I checked this particular invoice.

Q. What was the reason for the freight being allowed on that invoice?

A. Found that freight was allowed because we couldn't sell to the same customer represented on this invoice on our regular policy.

Q. Why was that?

A. Because of competition.

Q. Explain the competitive problem that brought that up.

A. Well, a competitor of the Sherwin-Williams Company sold this same customer on the basis of freight allowed, and therefore made it impossible for us to sell him on any other basis.

Q. I call your attention to Sherwin-Williams Invoice No. 4600 appearing on Respondents' Exhibit 205-B, being a shipment to the General Chemical Company, at Mount Claymont, Delaware, the designation in the column headed "Marking" being freight prepaid. Did you conduct any investigation and receive any reports as to why that particular shipment went out freight prepaid?

A. Yes, I checked this invoice.

Q. What did you ascertain?

A. I found that we had been shipping this cus-
3811 tomer for a long period of time on a prepaid basis.

Q. Why had you been doing that?

A. Well, for a matter of competition, we were unable to sell the customer on any other basis. We therefore shipped it prepaid.

Q. Is this same customer purchasing from competitors of Sherwin-Williams?

A. Yes.

Trial Examiner Norwood: Had you been selling them prior to that time on a basis of freight charges collect and then recoverable?

The Witness: Yes, previous to the time, we had to—

Trial Examiner Norwood: (Interposing.) Then, in either case, the freight was included in the price, was it?

Mr. Welch: May we go off the record?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Do you understand the question?

The Witness: No; would you read it?

Trial Examiner Norwood: Read the question.

(The reporter read the question.)

Trial Examiner Norwood: Answer the question.

The Witness: Before that we didn't recover the
3812 freight which we are on the present basis.

Trial Examiner Norwood: Then the only difference between the way you sold them after you met that competition and the way you sold them prior to that time was merely the matter of convenience in the matter of paying the freight, was it?

The Witness: No, we shipped them on a collect basis prior.

Trial Examiner Norwood: Did the customer own the goods at the same amount—on payment of the same amount, or at the same cost?

The Witness: Previously we shipped these customers on the basis of invoice collect delivered.

Trial Examiner Norwood: And the others were price plus the freight?

The Witness: Yes.

Trial Examiner Norwood: Now, later, when you met

the competition, you lowered the price because you paid the freight; is that right?

The Witness: Yes.

Trial Examiner Norwood: I just wanted to understand the previous testimony.

Go ahead.

By Mr. Welch:

Q. In other words, before you had to meet this 3813 competition, the customer paid the freight cost.

A. Yes.

Q. And now since you have met the competition, you pay it?

A. Yes.

Trial Examiner Norwood: All right; thank you.

By Mr. Welch:

Q. I call your attention to Respondents' Exhibit 205-F and call your attention to the invoice to Henry R. Bollinger, No. 24769, No. 23535, No. 24768, No. 510, No. 521, No. 509, all of the invoices which I have referred to being invoices to Henry Bollinger, and the notations in the "Marking" column are, "F. O. B. destination," or, "Prepaid." Will you please state whether you made any investigation, obtained any report as to why those shipments were sent to Mr. Bollinger on that basis?

A. Yes, I checked all of these invoices.

Q. What did you ascertain as to the reason why those shipments were sent either prepaid or f.o.b. destination?

A. I found that all of those shipments were made on a basis of prepaid because of competitive sales to this same account. They were made on a freight paid basis delivered at these various locations, and therefore it was necessary that we had to handle on the same basis in order to sell that same account.

3814 Q. Was this a series of stores operated by the same man in several different locations?

A. Yes, I found that to be true.

Q. A chain store operator?

A. Yes.

Q. Did Sherwin-Williams formerly sell him on a freight collect basis?

A. Yes, sir.

Q. And the change was made—was the change made only after you found what the competitive situation was?

A. Yes, after we found what the situation was.

Q. I call your attention to Respondents' Exhibit 205-F and Sherwin-Williams Invoices 43996, 44126, 44122, 44228, 44312, all representing shipments from Sherwin-Williams Company to G. P. Barney and the notation in the column headed "Marking" appearing variously as "f.o.b. shipping point with 50 per cent allowance on freight," and in one instance, to-wit, 44122, entirely prepaid. All other instances being 50 per cent allowed. Did you conduct any investigation, obtain any reports as to why those shipments were sent on a 50 per cent prepaid basis and in the one instance on a hundred per cent prepaid basis?

A. Yes, I checked these invoices.

Q. What did you find out?

A. I found that the change in basis of shipment
3815 to this account to allowing 50 per cent of the freight and of course the one case allowed the complete freight.

Q. Why did you do that—did you find out why that was done?

A. Yes. The reason was that we were unable to continue selling this account on a regular basis.

Q. Had you formerly sold him on your regular basis of freight collect for less carload amounts?

A. Yes, sir.

Q. Did you find out the reason why you couldn't continue to sell on your former basis?

A. Yes, I found that a competitor of the Sherwin-Williams Company was selling on a competitive basis—on a freight allowed basis.

Q. Is that the reason that Sherwin-Williams made the change?

A. Yes, sir.

Q. I will now call your attention to Sherwin-Williams invoices, Respondents' Exhibit 205-F, Invoice No. 25714, Pelton Hardware, Middletown, New York, with a notation, "Freight allowed," and also on Respondents' Exhibit 205-G, Invoices 10620, 9269, 26649, also involving shipments from Sherwin-Williams to Pelton Hardware Company at Middletown, New York, and carrying the notation prepaid,
200 pounds or over, freight allowed, 200 pounds or
3816 over. Did you conduct any investigation and receive any reports as to why those particular shipments were shipped on a prepaid basis or freight allowed basis?

A. Yes, I checked these invoices.

Q. What did you ascertain?

A. I found that we had previously sold this account on a regular collect basis, but that at the time of these sales, we had sold them on the basis as indicated.

Q. Did you ascertain why that was done?

A. Yes. I learned that we were faced with a problem of not being able to sell this customer on the regular basis and therefore made the allowance.

Q. Why weren't you able to sell the customer on that basis?

A. Because they were able to buy from a Sherwin-Williams competitor on a basis which allowed the freight.

Q. I call your attention to Respondents' Exhibit 205-F and show you Sherwin-Williams Invoice No. 3136, addressed to Mohawk Wallpaper & Paint Company, Utica, New York, with the marking, "Prepaid." Did you conduct any investigation and receive any report as to why that shipment was made on that basis?

A. Yes, I checked this.

Q. What did you ascertain?

A. I found that we were unable to sell this cus-
3817 tomer at this time on the regular basis of collect because competitively—or because competition sold them on the freight allowed basis.

Q. When you say competition, what do you mean?

A. A vendor who sold similar items.

Q. Had this company been sold on that basis previously?

A. On what basis?

Q. On the basis on which this order was shipped? Let me strike that. Before you ran into a competitive situation, how did you sell this customer?

A. We sold him on a collect basis.

Mr. Welch: Your witness.

Trial Examiner Norwood: Let's have a five-minute recess.

(Short recess.)

Trial Examiner Norwood: Come to order, gentlemen. You may proceed, Mr. Wright.

Cross-Examination by Mr. Wright.

Q. Mr. Lemke, how long have you been in your present position?

A. Since 1941.

Q. Since 1941?

A. Yes.

Q. What is the title?

3818 A. Manager of the auditing department.

Q. And what was your title in the position you held immediately prior to 1941?

A. Assistant to the credit and accounting manager.

Q. How long were you in that position?

A. I am sorry, that was the position before. I was traveling previous to my present assignment.

Q. Traveling?

A. Yes.

Q. In what capacity?

A. In the capacity of an auditor, investigating branches.

Q. For what period prior to 1941 were you doing that?

A. Approximately '41.

Q. That was back to 1936?

A. Yes.

Q. Prior to 1936, what was your position?

A. I was working in the district office as the assistant to the credit accounting manager.

Q. What district was that?

A. Southcentral District, now known as the Southeastern.

Q. What is the district office?

A. District office was at that time Cincinnati, now at Atlanta, Georgia.

Q. And how long were you in that position?

A. I started there in 1933.

3819 Q. Then, actually your experience doesn't go back 15 years as far as the company's policy is concerned, if you started in 1933?

A. That is right. When I worked in the assistant to the credit manager—in Cincinnati—I traveled under his supervision and those branches which were under his supervision, I reviewed and did similar work.

Q. But that was starting in 1933?

A. '33, yes.

Q. So that actually that experience doesn't go back

quite 15 years. You stated that you were familiar with the policy for 15 years back?

A. Well, I worked previously to Cincinnati in the same capacity under Mr. Campbell in our district office in Cleveland.

Q. You weren't working out of headquarters and dealing with headquarters policies for all branches prior to 1936?

A. No, sir.

Q. You were in a particular branch?

A. Or district.

Q. Or district.

A. Yes.

Q. Now, regarding these transactions with Pusner and Switzer and General Chemical and Bollinger and Barney and Pelton and Mohawk, about which you were testi-
3820 fying this morning, did you participate in any of those transactions when they occurred?

A. No, sir.

Q. Now, you stated that you made an investigation of those invoices which was the basis of your testimony; is that correct?

A. Yes.

Q. What did that investigation consist of?

A. I checked with the office handling those particular transactions.

Q. And they told you that was the situation?

A. They showed reports where our sales office had approved and headquarters approved those particular sales.

Q. Based on reports that had actually been kept in the files?

A. Yes, sir.

Q. Where are those reports, do you have them?

A. No, I haven't. They are available here.

Q. Was all of the information that you gave about those transactions on the reports?

A. Reports made by them; yes, sir.

Q. No part of your answer then in any respect was based on what those officials in the districts where those customers were located had told you had been the situation?

A. I wish you would repeat that question.

3821 Trial Examiner Norwood: Read the question.

(The reporter read the question.)

The Witness: I don't quite get one sentence. I should like to have that repeated.

(The reporter again read the question.)

The Witness: My report here was based entirely on what I found through checking the situation as represented by these particular orders, the same basis our procedure would be in auditing any situation.

By Mr. Wright:

Q. Tell us just exactly what you did.

A. I checked with the county manager in the accounting of these individual offices.

Q. How did you do that?

A. By contacting them either through letter, telephone, or wire.

Q. Now did their responses come to you?

A. On the same basis.

Q. Telephone calls, telegrams or letters?

A. Yes, sir.

Q. Did they transmit to you the documents which you have referred to?

A. No, sir.

Q. You haven't seen them?

A. No, sir.

3822 Q. Then actually all your testimony on these things was based on what these gentlemen told you, either orally or in a letter?

A. Yes, sir.

Mr. Wright: Your Honor, I would like to move all the testimony of this witness at this time regarding the transactions with Pusner, General Chemical, Switzer, Barney, Pelton, and Mohawk—it didn't appear on direct examination that the investigation which the witness referred to was one purely of hearsay, and since it now appears on cross-examination that this witness has no information except what was told him on a phone or in a letter from a branch official, his testimony is clearly inadmissible and should be stricken.

Mr. Welch: Your Honor, we take the position that those witnesses testified that those reports—in the first place, he is in the auditing department. The auditing department questions all invoices which do not follow the regular policy, and in questioning those, they obtain back these reports. These reports were obtained in the regular course of business, and the company had a right to rely on them

and did rely on them. I think perhaps that the manner in which some of them may have been received may go to the weight, but not to the right of this man to testify on the basis of reports that were received by him in the
3823 regular course of his auditing functions with the company.

Mr. Wright: Your Honor, that is the point. These aren't in the regular course of his auditing functions with the company. This man called these officials to determine something for the purpose of this proceedings about transactions already recorded here. There may be documents or reports kept in the regular course of the business in the branch offices. They have never been presented here and this witness has never seen them, by his own testimony.

He made statements here to the effect that prior to that time they were sold on a freight collect basis. When this competitive situation came up—he didn't name the competitors or any of the situations which gave rise to these things.

Certainly a branch manager or an official familiar with the transaction and dealing with the customer would be competent to testify what that situation would have been and would be subject to proper cross-examination as to those situations. Here it is being brought in by hearsay which completely deprives me of an opportunity of ascertaining the proper information.

Trial Examiner Norwood: Did your reports indicate in each case who the competitor was that had been
3824 selling him lower?

The Witness: In most instances, I don't recall. I could name some of them.

Mr. Wright: Your Honor, even in that event, all he knows is what a man told him on the telephone or wrote him in a letter. It is not record kept in the regular course of business. This was an inquiry specifically for the purpose of this hearing and for the purpose of his testimony.

Trial Examiner Norwood: Well, I think that if he is going to show justification of that price variation, he would have to show more exact information than he has given us here, general information here, and he would have to show it by direct evidence rather than this investigation.

Mr. Welch: Your Honor—

Trial Examiner Norwood: (Interposing.) He received this information not at the time that the lower price was

made. It isn't information that he received in the due course of business and acted on. His report comes after the action is taken by somebody else.

Mr. Welch: Your Honor, he has testified that he obtained these reports in the same manner in which he obtains reports—in the first place, he testifies that now when a sale is made and isn't made on the recognized
3825 basis, that the auditing department checks it and makes an inquiry, just as he testified he made this inquiry, maybe by telephone, maybe by wire, maybe by letter. Why did you do this? It is reported back. The company has satisfied itself on that basis and acted on it in approving that sale and letting it go through.

This investigation was made the same way as the ones on which the company does rely in the course of its operations. It is true this one was made subsequently but it follows the pattern that the company does make them and upon which it acts.

Mr. Wright: No—

Trial Examiner Norwood: (Interposing.) It seems to me the information upon which they acted was received by this branch manager, or whoever was in immediate supervision over the salesman who reported it. He would be permitted to tell what this salesman told him, and he would be permitted to show that he had investigated and found it was a bona fide claim on the part of the customer which justified him in making the lower price, so I think this is once removed from that, and so far as this evidence relates to the making of a lower price than this Respondent made to other customers in order to meet an equally low price of the competitor, I think that I will allow the motion. The evidence can stand for other purposes.

3826 Mr. Wright: Your Honor, I want to point out now that my objection and my motion go also to an issue that has been raised here.

It has been my contention that the Sherwin-Williams Company has substantially followed the zone method of selling. The issue has been raised on that. A vice-president of the company said we don't follow the zone system, we add freight to a customer not at a shipping point. These other records were put in by the Commission to prove that they don't add freight in many instances, and it was to rebut that.

Now, he has—

Trial Examiner Norwood: (Interposing.) I think he can show that.

Mr. Wright: This witness is testifying about competitive situations here. If I cross-examine him on a point he doesn't know, all he can tell me is that the man who told him didn't tell him that. "The man that told me this story, didn't tell me what the answer was to that situation. I had nothing to do with these transactions."

Trial Examiner Norwood: He has testified that in general he has followed this policy here which it is claimed is analogous. Then he gave other testimony showing that he departed therefrom.

You don't object to the testimony showing that he
3827 departed from it, do you?

Mr. Wright: I object to trying to vary what appears on the face of written documents in the record, officials' transactions, invoices of officials' transactions of the company, by hearsay evidence, which has gotten up for the purpose of this hearing.

Mr. Welch: Mr. Wright—

Mr. Wright: (Interposing.) The actual evidence of these transactions are in the record.

Mr. Welch: I object to the statement that we are trying to vary them. We are trying to amplify them and explain them but not vary them.

Trial Examiner Norwood: I will let my ruling stand. I have allowed your motion with a qualification.

Mr. Wright: If it is hearsay and is inadmissible because it deprives me of cross-examination, how can any part remain?

Trial Examiner Norwood: It is admissible to show the fact that they did vary.

Proceed.

By Mr. Wright:

Q. Mr. Lemke, with reference to Pusner, now, where is he located?

A. He has a place at, I believe, Tucson. I am not sure, I will have to refer to the invoice.

3828 Q. Who was the competitor involved in this situation with Pusner?

Mr. Welch: Just one second. Your Honor, the motion as I understand it was allowed in so far as the competitive situation was concerned. Now, if that is true, I object

to cross-examination on the competitive situation because his testimony has been stricken so far as that is concerned.

Mr. Wright: The testimony—if the testimony is to stand in the record for any purpose, I demand a full and complete cross-examination.

Trial Examiner Norwood: Overrule your objection.

Mr. Welch: Yes.

Trial Examiner Norwood: If he can bring out some further testimony from this witness that renders that admissible for all purposes, he may do so.

I understood that it is to be received only on the proposition of showing the variations and for no other reason.

Mr. Wright: I didn't understand the testimony was offered for that reason. I didn't know what was in counsel's mind.

Trial Examiner Norwood: Go ahead.

The Witness: I think the competitor in the case was Fuller Paint.

3829 By Mr. Wright:

Q. You think it was?

A. I would have to refer to a reference to make it positive.

Q. What reference?

A. Report made to me by our accounting department.

Q. You received a letter from your accounting officer?

A. I believe there is a letter.

Q. Which was the basis of your testimony?

A. Yes.

Q. Statements that were in that letter. Do you know anything else about that transaction that isn't in that letter?

A. I know the method of handling that particular transaction from the face of the invoice and the markings thereon.

Q. You have no other knowledge outside of the exhibit we have been talking about this morning and that letter you received about that particular situation involving Pusner?

A. No, except general information about our problem of selling competitively.

Q. I asked you about this particular transaction.

A. I know that we have a problem with Fuller Paint selling customers.

Q. No.

Mr. Wright: I move that be stricken as not being
3830 responsive.

Trial Examiner Norwood: Read the question and answer.

(The question and answer were read by the reporter.)

Trial Examiner Norwood: Motion denied.

By Mr. Wright:

Q. When did you first start selling on a fully prepaid basis in less than carload lots to Pusner as a result of this competition?

Mr. Welch: Will you read that question, please?

Trial Examiner Norwood: Read it.

(The reporter read the question.)

A. I don't know exactly the date.

By Mr. Wright:

Q. That wasn't in the letter?

A. I don't recall whether there was any reference made as to when we transferred it as to the exact date, but I believe it is in the letter.

Q. Now, with reference to Switzer. I believe Switzer is in Flagstaff?

A. That is right.

Q. Who was the competitor involved there?

A. I believe it was Premier Oil Company.

Q. Where are they located?

3831 A. I don't know.

Q. What is their business?

A. Selling paints and oiling and so forth, sundries, associated sundries.

Q. In other words, in some of these situations the competition would be not alone from lead pigments, lead in oil, but also mixed paint?

A. In reference to paints, I used lead and oil for paints.

Q. When did this situation first arise so that you made the departure from your stated policy with reference to Switzer?

A. I don't recall, I don't know when the change was made.

Q. Was that transaction also covered in a letter that you received as a result of your inquiry?

A. I think it was.

Q. How did you obtain the information regarding the General Chemical Company situation?

A. I checked with our manager in Philadelphia.

Q. How did you do that?

A. By letter.

Q. You received a letter back from him?

A. Yes, sir.

Q. Giving you the details?

A. Yes, sir.

Q. Do you have that letter with you?

3832 A. No, I haven't.

Q. Who was the competitor involved there?

A. I don't recall the competitor's name in that case.

Q. Do you recall whether it was listed in the letter?

A. I am not positive about it.

Q. When did this situation first arise when you changed your policy with reference to that company?

A. I don't recall the exact date.

Q. Was that in a letter?

A. Yes, there was information in the letter as to the approximate time when they started selling them, but I don't recall as to any exact dates.

Q. How about the information regarding Bollinger, who did you get that from?

A. Bollinger, from our credit and accounting manager in—

Q. (Interposing.) By correspondence, by letter?

A. By telephone, by letter, and by wire.

Q. Do you have the correspondence and telegrams? Did you receive correspondence and telegrams in response to your inquiries from him?

A. Yes.

Q. Who was the competitor involved in that situation?

A. I don't know.

Q. What time did it—at what date did it become necessary to make the change from your policy?

3833 A. In Mr. Price's correspondence he indicated the time that change had to be made in the Bollinger account, but I don't recall generally when that took place.

Q. How about the Barney, Pelton, and Mohawk situations, were they also out of the New York office?

A. Yes, they were.

Q. And they were obtained along with the Bollinger information?

A. Either with or separately, I don't recall exactly.
Q. In the same manner?
A. Yes.
Q. Do you recall who the competitors were in any of those situations?
A. No, I can't give you the names of the competitors.
Q. Can you tell me the time of any of them?
A. When they changed?
Q. Yes.
A. Not exactly: I don't recall the date of the changes.
Q. In your experience with the company, has it been the general practice that the company will adjust to meet competition in this matter of freight charges where it is necessary?
A. Yes. It has become necessary and in order to do that, we find in our auditing activity that those changes
3834 have been made and we do list them as an exception, but before accepting them, we see to it from our normal course of business that they have been properly approved by the sales office and headquarters.
Q. Now, in these situations involving these gentlemen, you didn't have any such records as those here in Cleveland at the general offices, did you?
A. Only because the period of time it covers that our records are not set up as exceptions from our auditing.
Q. Do you know what the competitive practices were in these situations which led to these situations? I am talking about the specific ones you testified about, Pusner and Switzer and General Chemical and Bollinger and Barney and Pelton and Mohawk?
A. I don't understand what you mean by competitive practices.
Q. Well, you stated that you changed your method of handling freight charges to meet competitive practices in each of those situations. Do you know what those competitive practices were?
A. Yes, it was that we were unable to meet the price that they were being sold by competitors.
Q. Do you know whether that was a matter of competitive price or the way competitors handled their freight charges?
A. Well, I think—
Q. (Interposing.) Don't tell us as to what you
3835 think in regard to these situations, tell us what you know.

A. I know that the freight collect policy was changed to freight prepaid policy, in order to meet such situations.

Q. But you don't know what the actual practices of each competitor were in each of these situations, do you?

A. I know generally from a discussion and from my investigation of certain individuals.

Q. You mean from your conversations over the phone and your letters and wires with the branch officials when you got this information?

A. Wherever an accounting manager with whom I checked on all these situations didn't satisfy my investigation from a letter, then I made it a point to telephone him and refer to records that indicated just how these situations were handled so that I was positive before accepting that, on the same basis I made any audit, that what I stated in here so far as conditions are concerned, that it was right, it was acceptable to me.

Q. But you don't know the names of the competitors in most of the situations and you don't know the exact situation that you were meeting, whether it was a change in the price or change in the method of handling freight charges by the competitors?

A. In those particular cases, I didn't concern myself with what that practice of a competitor was so much
3836 as determining that our responsible man in charge gave me such information, who has that responsibility to—

Q. (Interposing.) And that is what you are repeating here is the information they gave you?

A. Some of this information I have not been able to recall and record in my mind because of the large number of items.

Q. Now, you testified yesterday and this morning, Mr. Lemke, at great length about the company's policy with reference to freight handling. When you made these marks on Respondents' Exhibit 205, with sub numbers, under the column "Code," A, B, C, and so forth—when you were marking the transactions A and B, you were doing that of your own personal knowledge of what the local city delivery areas and free delivery areas around near shipping points were, were you not?

A. Yes.

Q. That wasn't on the basis of company policy, you knew that?

A. I knew what the company policy was.

Q. But you also knew these areas of your own knowledge?

A. Oh, yes; I did.

Q. Now, those that you mark with a "C" now, those transactions in which there was no indication on any of the exhibits that we have in the record as to who paid the
3837 freight, you marked them C as having freight prepaid and then recovered, or as being sent freight collect. You don't know of your own knowledge as to each of those transactions that that was done, do you?

A. Oh, yes; I do.

Q. You have checked each one of these transactions and know that?

A. No, but we have a procedure of handling invoices that we know what the requirements are, if they were handled otherwise.

Q. Well now, it was the company's policy, in those situations where you marked them with a C to send them freight collect, or to prepay and then recover the freight? You testified to that, but isn't it correct to say that you assumed that they were handled that way, but you don't know of your own knowledge as to each transaction that they were so handled?

A. It is not right to assume that we don't know because we do know.

Q. How do you know?

A. Our orders are all sent collect by original instructions, and, by the way, they are audited carefully, that this procedure is followed. Our shipping offices do not enter a shipment on a bill of lading unless that order instructs
3838 them otherwise.

Q. Didn't you testify yesterday that you discovered from time to time instances where they had prepaid the freight on transactions in less than carload at points other than shipping points where they should have sent it freight collect or recovered it?

A. Yes, sir.

Q. Couldn't that have been the situation as to some of these transactions that you marked with a C here?

A. In those cases we would find an additional charge.

Q. Where?

A. On an invoice.

Q. It couldn't happen otherwise?

A. Not unless it was an error.

Q. That is what we are talking about is errors.

A. The error would show up, though, in our accounting.

Q. It wouldn't show up on the invoice?

A. No, but it would show up on our ledger account because it was shipped prepaid and it automatically would have to be accounted for to the customer.

Q. Now, let's go back to this policy again. You state it is the policy to equalize freight with the shipping point?

A. Yes.

Q. To any customer of these lead products, located away from a shipping point, unless the shipment is in a
3839 carload or a truckload, it is a government, railroad, or steamship company; unless it is one of those special points which are not shipping points, but to which free delivery is allowed, Chattanooga, Washington, and others, or unless there is a local competitive situation where you make a free delivery area. Does that substantially state it?

Mr. Welch: Will you read that question, please?

(The reporter read the question.)

Mr. Wright: I will withdraw the question.

By Mr. Wright:

Q. It is the general policy to a customer located away from a shipping point to equalize freight by charging him the difference in the freight rate from the factory to his location as compared with the freight rate from shipping point to factory?

A. The customer would only stand the freight not excessive to the freight rate which is in position to be used from the normal shipping point to his location.

Q. Well now, let's get back into another one of your illustrations. Take the situation that you were speaking of yesterday with reference to Union, Mississippi. I believe you stated that the closest applicable shipping point was New Orleans?

A. That is right.

Q. Now, if you ship him direct from Chicago in
3840 less than carload, how do you bill him?

A. We would bill him the amount of freight from New Orleans to his location, or Union, Mississippi.

Q. That would be the situation if you shipped him out of Dallas?

A. No, Dallas' rate is less to Union than it is to New Orleans.

Q. What rate do you charge him then? You don't charge him any freight at all?

A. We don't charge him any freight at all.

Q. Now, that policy, then, doesn't apply when you have got what you call a carload order?

A. There is no freight involved on carloads.

Q. And you said that the carload policy also extends to truckloads?

A. Yes, sir.

Q. What is the weight, minimum weight of a truckload under your policy?

A. Approximately 20,000 pounds. It varies, I think, depending upon length: I am not sure.

Q. You adopt for that purpose the minimum carload weights that appear in the tariffs, or do you have some company rule on that?

A. I have always taken our transportation department's weight as authentic.

3841 Q. Now, assuming you have a situation where you have an am ıt which is a truckload but is not a rail carload, and yet you send it by rail freight, you pay an LCL rate on that but the customer is not billed that amount?

A. It is not our custom to ship by rail in that situation, but it will go by truck.

Q. Then it would invariably go by truck?

A. Yes.

Q. That policy then doesn't apply to truckloads and carloads, doesn't apply to government agencies, is that what you testified to?

A. What policy were you—

Q. (Interposing.) This freight policy of adding freight from a shipping point.

A. Yes.

Q. You mean "Yes, it does not apply to government agencies"?

A. The freight policy of adding freight or equalizing at the shipping point does not apply to carload shipments.

Q. Does it apply to shipments to any agencies of the government?

A. Yes.

Q. Does that include local, municipal, and state governmen.?

A. Yes.

3842 Q. And Federal?

A. Yes.

Q. It doesn't apply to railroads or steamship lines, either?

A. No, it doesn't apply to—

Q. (Interposing.) Does it apply to what you call your industrial accounts?

A. Yes.

Q. In billing your own stores, does it apply to your billing of your own stores?

Mr. Welch: Objection, your Honor, to any testimony of intercompany billing among stores. How they handle their own financial arrangements with their own stores is not involved in this case. The practice of the stores—I understand, your Honor has held that the practice of the store in selling to other customers from their retail stores is in the case, but this is the first question of intercompany billing that has come up and I object strenuously to that testimony being received.

Trial Examiner Norwood: Objection overruled.

The Witness: I would like to have the question read.

Mr. Welch: May we have a short recess, your Honor?

Trial Examiner Norwood: Yes, take a short recess.

3843 (Short recess.)

Trial Examiner Norwood: Back on the record.

After further discussion off the record, I will reverse my ruling and sustain the objection to the question relating to the question of the policy of the Respondent with its company-owned stores.

Go ahead.

By Mr. Wright:

Q. Mr. Lemke, do the retail stores maintain warehouse stocks of lead products, under your policy of the company?

Mr. Welch: Your Honor, may I have a continuing objection without having to get up and repeat it, to any questions, any answers that relate to retail store operations, how they sell, what they do?

Trial Examiner Norwood: No.

Mr. Welch: May I have the objection?

Trial Examiner Norwood: Counsel may have his objection. I will overrule the objection.

Mr. Welch: And it will be a continuing objection?

Trial Examiner Norwood: To questions of how the retail stores sell.

Go ahead.

The Witness: I would like to have the question read, please.

3844 (The reporter read the question.)

The Witness: Yes, we carry stock for resale.

By Mr. Wright:

Q. Now, to refresh your recollection, I show you Commission's Exhibit 776 with sub numbers, which is a roster of retail stores of the Sherwin-Williams Company as of October 1, 1944. Does the company also sell lead products, white lead, white lead in oil, red lead, red lead in oil, to dealers, dealer-customers who are located in the same towns in which you have stores?

Mr. Welch: Objection, your Honor.

This witness in the first place was not questioned on direct with respect to that type of matter. I don't know what he has any knowledge of it. He is not in the sales department. He doesn't know whether dealer-customers are located in those cities or not.

Trial Examiner Norwood: He can tell it if he knows. Objection overruled.

The Witness: We ship merchandise to some of those locations where there are dealers.

By Mr. Wright:

Q. Now, is it ever a practice of the company in handling an LCL shipment to the dealer in a town in which a store is located, other than the regular warehouses of which we have been talking, to ship that order to the dealer

3845 from the store?

A. Yes, occasionally, accommodation sales.

Q. In those instances, it would be cheaper to ship a less than carload order from a factory or warehouse, would it not? In other words, delivery from a store which had a stock would be an economy to you?

A. We don't make it a practice to use our stores to service regular accounts of that sort, but we do use them for occasional accommodation, special rush orders, and only occasionally.

Q. What is the basis of sale as far as transportation charges to the customer, when that is done at a point which is not a shipping point?

A. If the shipment is made to any town outside of where a store may be located, it is shipped on a truck basis.

Q. If it is in the same town?

A. It is a local delivery, along with our regular cartage deliveries.

Q. Would that be—even though the place where the store is is not a shipping point, if it was local delivery in that town, it would be treated as if it were a shipping point?

A. Yes, on these few accommodation sales.

Q. Freight from the shipping point wouldn't be added?

A. No.

3846 Q. Now, you gave us a list of these shipping points from those price lists the other day, Mr. Lemke. I show you Commission's Exhibit 662-C and D which is a document headed "Lead and Zilo price differentials for shipments from all S-W warehouses and retail branches." That is dated 1936. Does there—there is a similar list, Commission's Exhibit 662-G and H, for 1937, and a similar list, dated May 21, 1942, Commission's Exhibit 662-S and T.

Are there not on those lists many locations which were not included in your list of shipping points?

Mr. Welch: Your Honor, I object to the form of the question because it is misleading to the witness in that he has quoted the caption on one exhibit. The captions on the two other exhibits do not conform to the one quoted.

Mr. Wright: We will talk then about 662-C and D from which the caption was quoted.

The Witness: There are—

By Mr. Wright:

Q. (Interposing.) There are many points on there not included in shipping points?

A. Yes, not on the list previously discussed.

Q. This document purports to give the prices and differentials at those points. There is nothing there about addition of the freight to any of those points. Can you explain that fact?

3847 Mr. Welch: Will you read the question?

(The reporter read the question.)

A. No.

By Mr. Wright:

Q. This is in evidence. I call your attention to the fact that this is in evidence as a part of a general trade sales department bulletin by Sherwin-Williams Company, stat-

ing its prices in terms of sale, if you will examine Commission's Exhibit 662-A and B, which accompanies the list you referred to.

A. I would like to have that question read.

(The reporter read the question.)

Mr. Welch: Just one second.

Mr. Wright: The previous question.

Mr. Welch: Your Honor, I object to the question on the ground that there is no evidence that the two documents accompany each other. They bear somewhat close dates. There is no reference on one to the other.

Mr. Wright: I would like to correct counsel and point out the statement on 662-B "where the delivery point is outside the eastern territory, add to these prices the full advanced differential as shown on the attached Bulletin 16," which obviously refers to—

Mr. Welch: (Interposing.) No, this is Bulletin 18. That says Bulletin 16. There is nothing to show that this 3848 accompanied Exhibit 662-A and B.

Mr. Wright: Well, off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. Wright: I will withdraw the pending question.

By Mr. Wright:

Q. Mr. Lemke, are you familiar with the general trade sales department bulletins which are similar to Bulletin No. 37, May 21, 1942, in the record as Commission's Exhibit 662-Q and R?

A. I know about them, but I am not familiar with all of the detail.

Q. In your duties as auditor in order to determine company policy with regard to prices and so forth, you consult these general trade sales bulletins; is that correct?

A. At the current audit, we would then verify with the current bulletin, but for me to be familiar with a document I haven't seen for several years, I don't know that I would recall all the details.

Q. Now, from your use of these trade sales bulletins in your duties there, I would like you to examine Commission's Exhibit 662-R and the statement under the term "Zone differentials," and then examine Commission's Exhibit 662-S and T.

A. I don't know whether this document is a price—

3849 Mr. Welch: (Interposing.) Just a minute, he hasn't asked you a question.

By Mr. Wright:

Q. I want you to examine the two of them.

A. Yes.

Q. Do the general trade sales bulletins include a list of lead and Zilo price differentials similar to the one in the record as 662-S and T?

Mr. Welch: Read the question, please.

(The reporter read the question.)

A. I don't know. I don't quite understand your question.

By Mr. Wright:

Q. Have you seen a document similar to this, 662-S and T, as a part of your general trade sales bulletins, of which 662-Q and R are copies?

A. I have seen similar ones.

Q. Are they considered to be a part of the general trade sales bulletins?

A. Yes.

Q. Now, can you tell me how the freight is handled on less than carload shipments to customers located in the towns which appear on 662-S and T, Commission's Exhibits, which are not shipping points?

A. Yes.

3850 Q. Will you tell us how?

A. Shipments made from factory or shipping points to customers in any of these stores where there isn't a shipping point located, we would ship LCL—we would ship less than carload rates on the basis of freight collect.

Q. In other words, that would be handled exactly in accordance with the policy of the company you have been testifying about for the last two days?

A. Yes, it would.

Q. Will you tell me again the list of shipping points on the Pacific Coast?

A. Spokane, Seattle, Portl[illegible], Santa Rosa, Sacramento, Oakland, Los Angeles, Phoeni[illegible].

Q. Those are all there are, to your knowledge?

A. Yes.

Q. How far back would your answer go on that?

A. I don't understand your question.

Q. Over how long a period of time has that been true that those have been shipping points on the Pacific Coast?

A. As long as I have had any knowledge of them.

Q. I show you Commission's Exhibit 782-A through -S, which is a price bulletin by Sherwin-Williams Company, dated February 5, 1943, and direct your attention particularly to Bulletin No. 6 in that series—no, 5, which is Commission's Exhibit 782-D, and ask you to examine that.

3851 A. Yes.

Q. Now, directing your attention to those statements, "f.o.b. terminal points," do you know what is meant by "terminal points" in that price bulletin?

A. No; I am not familiar with that.

Q. Doesn't that indicate to you that deliveries are to be made free on board to those points in those zones?

A. Restate that question, please.

(The reporter read the question.)

The Witness: It would indicate that.

By Mr. Wright:

Q. Without the addition of any freight at those points?

A. I am a little confused about your question. You mean free on board?

Q. I mean free on board at those points, rather than being shipped freight collect to the customer.

A. I don't know what reference the "f.o.b. terminal points" is. I am not certain about that.

Q. I will let you examine the whole exhibit which is a series of price bulletins from the Sherwin-Williams office. You can perhaps refresh your recollection by examining the exhibit.

Mr. Wright: May we have a short recess while the witness examines the exhibit?

Trial Examiner Norwood: Yes. Take a short

3852 recess.

(Short recess.)

Trial Examiner Norwood: Proceed.

By Mr. Wright:

Q. Have you gotten any more light from a further reading of that exhibit, Mr. Lemke?

A. Yes, I think I understand it better now.

Q. Will you explain it now?

A. Explain what?

Q. What the term "f.o.b. terminal point" means with reference to delivery and freight charges.

A. I don't know, but it would indicate that these particular locations are considered terminal points, but I don't know that freight would be allowed to shipments in those particular points. That I don't know.

Q. I call your attention to the fact that Commission's Exhibit 782-F indicates that Salem, Oregon, is also a shipping point where no freight is added or delivered.

Mr. Welch: Just a second. Your Honor, I object to that statement.

Mr. Wright: It is not a question. I have not yet perfected the question.

By Mr. Wright:

Q. Do you recall anything about that situation at Salem?

Mr. Welch: Your Honor, I would like to have the 3853 statement read back.

Trial Examiner Norwood: Gentlemen, I am going to ask you to take seats, please. It makes for confusion.

Mr. Welch: I would like to have counsel's statement read back.

Trial Examiner Norwood: Read back the statement.

(The record was read by the reporter.)

Mr. Welch: There is no statement on there to the effect that Salem is a shipping point. There is a statement that shipments to Salem are f.o.b., but there is no statement to the effect as stated by counsel.

Trial Examiner Norwood: Doesn't that come to the same thing?

Mr. Welch: No, your Honor, this may be off the record.

Trial Examiner Norwood: Put it on the record.

Mr. Welch: All right.

We may sell customers at Salem, Oregon, and delivered to that point f.o.b. That doesn't mean that is a shipping point on which we will make shipment on any kind of basis. I object to the characterization of it as a shipping point.

Trial Examiner Norwood: I will ask the Commission's counsel to frame his question in line with that explanation.

Mr. Wright: I will withdraw the question, your 3854 Honor.

By Mr. Wright:

Q. As an expert auditor, what is the meaning of the term "f.o.b." as customarily used in business, Mr. Lemke?

A. Free of delivery.

Q. Free of delivery, did you say?

A. Well, now, I have always understood f.o.b. to mean, as an example, f.o.b. Chicago means that we delivery at that particular point.

Trial Examiner Norwood: Freight paid?

The Witness: Yes.

By Mr. Wright:

Q. Delivered to the customer freight paid at that point?

A. That is right.

Q. Now, I direct your attention on Exhibit 782-F to this statement, "Shipments to Salem, f.o.b. Salem, Oregon. Shipments to other points, f.o.b. Portland, Oregon."

A. Yes.

Q. What does that indicate to you about your practices at that time in that area?

A. Shipments to Salem, for example, would be made f.o.b. Salem.

Q. And shipments to other points in Oregon would be made where?

A. Made—I understand you—

3855 Q. (Interposing.) And shipments to other places in Oregon are made f.o.b. Portland; isn't that correct?

A. Yes.

Q. Wouldn't that indicate that a customer purchasing at Salem would not be charged any freight on that shipment, but would receive the freight paid at Salem, whereas customers at other points in Oregon would pay the freight from Portland?

A. Yes, that would be true.

Q. Wouldn't that also be a fair interpretation from your experience of Commission's Exhibit 782-D, and the f.o.b. terminal points that are set forth there?

Mr. Welch: The witness is allowed to see the exhibits? May I show him my copy?

Mr. Wright: This is a little clearer.

By Mr. Wright:

Q. Wouldn't that also indicate from your experience that the customer received the shipment at that point without paying any freight charges?

A. I am not quite familiar with the terminology there, f.o.b. terminal points.

Q. What is your definition of the word terminal?

A. Well, it is a center or a location.

Q. Wouldn't that statement there of certain localities being f.o.b. terminal points be logically interpreted
3856 to be points at which the goods were sold to the customer without the addition of freight charges?

Mr. Welch: Objection to how it would logically be interpreted.

Trial Examiner Norwood: Objection overruled, let him tell us about it.

Mr. Welch: What his interpretation is.

The Witness: It would indicate it.

Mr. Wright: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: Recess until 1:30.

(Whereupon, at 12:00 o'clock, Noon, the hearing was adjourned until 1:30 o'clock, p.m.)

3857 Afternoon Session.

1:30 p.m.

Trial Examiner Norwood: All right, gentlemen, proceed.

H. C. LEMKE resumed the stand and testified further as follows:

Cross-Examination (Continued) by Mr. Wright.

Q. Now, Mr. Lemke, these Pacific Coast shipping points you spoke of, Spokane, Seattle, Portland, Sacramento, Oakland, Los Angeles and Phoenix, assume now that you were going to ship to Butte, Montana. That is in the Pacific Coast area, is it not?

A. I don't know for certain.

Q. It is the western part of Montana. I would assume it would be. Spokane, Washington, would be the geographically closest shipping point to Butte?

A. Yes, it would be.

Q. On a less than carload shipment, according to your

statement of policy, to Butte, they would add the freight charges from Spokane or some one of these other points that might be closer, to Butte?

A. The closest one.

Q. To Butte?

3858 A. Yes.

Q. And that is how they would arrive at that price?

A. Well—

Mr. Welch: (Interposing.) Objection, your Honor; it isn't price. He is interchangeably using the words "freight" and "price."

Trial Examiner Norwood: I think that—

Mr. Wright: (Interposing.) I withdraw that. I had no intention of confusing the witness.

By Mr. Wright:

Q. Is that how they would handle that transaction?

A. Yes.

Q. I call your attention to the fact that in this Commission's Exhibit 782-E that we were looking at this morning in the Pacific Coast bulletins, "For deliveries to points outside par zone add the following differentials: Zone 1, 25 cents per zone higher; Zone 2, 50 cents per zone higher; Zone 3, 75 cents per zone higher." Now, I call your attention to the fact that Butte is listed on 782-D as being in Zone 3. Spokane, the shipping point you mentioned, is in Zone 2. How would the statement on 782-E of those differentials affect that transaction we are talking about at Butte?

A. I don't know, but those differentials affect prices, not the rate.

Q. In other words—how would you suggest that 3859 would be worked out according to policy? How would you calculate the price there?

A. Well—

Q. (Interposing.) Would you add the 75 cents differential for Zone 3?

Mr. Welch: Objection, your Honor; this witness is not qualified as to price setup.

Mr. Wright: I beg to disagree with counsel. He has qualified this man as one who has gone in and audited these transactions and knows how the company's policy applies to all of them.

Trial Examiner Norwood: I will overrule the objection; you may answer.

The Witness: I don't know that.

By Mr. Wright:

Q. Now, I call your attention to Commission's Exhibit 789 which is from the confidential price book of the Sherwin-Williams Company on the Pacific Coast effective January 26, 1942, the note there, "Advance Los Angeles Schedules 25 cents per hundredweight for San Bernardino, Riverside, Pomona, and Santa Barbara prices." Do you know whether those are f.o.b. prices at those points that are contained in that note, without the collection of any additional freight from customers at those points?

A. No, I don't know.

3860 Q. I call your attention to the statement immediately above the one I read to you: "Above prices are f.o.b. Los Angeles, California"; that would indicate that freight was charged from Los Angeles, would it not?

A. Providing you shipped from Los Angeles.

Q. Los Angeles is your warehouse for southern California, isn't it?

A. Yes.

Q. Shipping point?

A. Yes.

Q. As an exception under that note that prices are f.o.b. Los Angeles is a statement that there is a 25-cent per hundredweight differential for those following places, all of which are within a hundred miles of Los Angeles. What does that indicate to you about how the prices are made at those points out there? Is it—

A. (Interposing.) I don't know but I assume that would be added to the price.

Q. And then freight from Los Angeles added in addition, under your policy?

A. Providing any of these locations are not in the free delivery area, that is right.

Q. Well, now, some of those places are as much as 60 to 70 miles from Los Angeles?

Mr. Welch: Is that a question.

3861 Mr. Wright: I was calling the witness' attention to a fact that is well known to everyone who has been in that section of the country.

The Witness: On that basis, it would be, I assume.

By Mr. Wright:

Q. In other words, what they would do would be to sell to those places and add the freight to Riverside, for instance, and still add 25 cents in addition?

A. I don't know, but that is what I would assume.

Q. In other words, you wouldn't assume that—from that note that there would be no freight addition except for that 25 cents extra which is to be added on that price?

A. I don't quite understand that question.

Q. Isn't it a reasonable assumption from the statements which are appearing in that Commission's Exhibit 789 that when a less than carload shipment is made to one of those towns in the note, that no freight is added but they are sold at a price simply 25 cents a hundredweight higher than the Los Angeles price?

Mr. Welch: Objection, your Honor. He asked him just the other way a moment ago, that freight would be added in addition to the 25 cents.

Mr. Wright: I asked the question one way, and I am trying to ask the question the other way.

3862 Trial Examiner Norwood: Objection overruled. Answer the question.

The Witness: I don't know anything about the 25 cents additional to the price. However, I do know that the freight would be collect.

By Mr. Wright:

Q. To Riverside or San Bernardino?

A. No.

Q. In other words, that is not an exception to this policy you have been talking about?

A. There is no exception so far as it pertains to freight.

Q. You stated that with reference to the item covered by Invoice No. 46019 appearing on Respondents' Exhibit 205-H that Burlingame is in the free delivery area for Oakland, California, is that correct?

A. Yes.

Q. Do you know what geographical relationship obtains between Oakland and Burlingame?

A. I don't know, but I assume around 20 or 25 miles.

Q. I call your attention to Commission's Exhibit 794-K where that same invoice, 46019, is recorded, and to the information which was filled in by the traffic department of

the Sherwin-Williams Company showing that 37½ cent rate between Oakland and Burlingame. Now, are there any other areas which you consider as free delivery areas
3863 that you are talking about now which involve freight rates in excess of 25 cents a hundredweight?

A. I don't know of any.

Q. You also testified that Baton was in the free delivery area—you stated with reference to Invoice No. 9800 which appears on Respondents' Exhibit 205-P that Baton was in the free delivery area of Houston. Is that one of those contiguous suburbs that you spoke of as being in the free delivery area?

A. I know that Baton is considered in a free delivery area.

Q. I call your attention to Commission's Exhibit 794-U where that particular invoice is also recorded with the information supplied by the Sherwin-Williams traffic department showing a freight rate between Baton and Houston of 30 cents a hundredweight. Do you know how far those two areas are apart?

A. No, Baton is right in the bay area, there.

Q. Now, referring back to the transaction which you were discussing in your direct examination which is recorded on Respondents' Exhibit 205-O and also on Commission's Exhibit 794-C, you stated that you checked it—

Mr. Welch: (Interposing.) Will you identify the transaction, Mr. Wright?

Mr. Wright: The invoice number is 8579.

3864 By Mr. Wright:

Q. You stated that you had checked those rates and the rate from St. Louis to Dallas was $1 and Dallas to Union was $1.10, therefore, there had been no change in the rate from that.

Mr. Welch: I object, I believe that was changed later.

Mr. Wright: You revised that to $1.09.

Trial Examiner Norwood: Yes, I think he did.

By Mr. Wright:

Q. Now, did you check those rates in the applicable tariffs, applicable to the time the shipment was made?

A. I follow the traffic department. I am not in a position to say what checking gave me.

Q. But you didn't actually get into that yourself, into checking the tariff?

A. No, sir.

Q. Now, when you were talking about these invoices, Mr. Lemke, and your policy on freight payments and charges to customers, you were speaking of lead products, generally, were you not?

A. Yes.

Q. You testified that this Respondents' Exhibit 206, Invoice No. 3552, was in accordance with the policy?

A. Yes, sir.

3865 Q. What products does that cover?

A. Pure zinc oxide in oil.

Q. In what size container?

A. 90 pound.

Q. In a returnable drum?

A. Yes, sir.

Mr. Wright: No further cross-examination.

Trial Examiner Norwood: Any further questions?

Mr. Welch: Your Honor, will you give us a recess for a minute or two?

Trial Examiner Norwood: Yes.

(Short recess.)

Trial Examiner Norwood: All right, proceed.

Redirect Examination by Mr. Welch.

Q. Mr. Lemke, do you know whether the cartage rates for city delivery vary in the different cities?

A. Yes.

Q. Is their uniformity of local transportation companies for city deliveries as to cartage prices?

A. No, there is not uniformity.

Q. With reference to Respondents' Exhibit 206, if the product shipped under that invoice had been white lead in oil, would it have been handled the same way with reference to recovery of freight charges?

3866 A. Yes, it would.

Q. Does the fact that two different products are involved in Invoice 3453 which appears on Respondents' Exhibit 205-A and the product involved in Respondents' Exhibit 206 are different products affect your testimony that Invoice 3453 was an error in that the freight was not recovered?

A. It wouldn't change the circumstances at all.

Q. On cross-examination you were shown Commission's Exhibit No. 776, A to N, inclusive, and were questioned as to whether all the stores thereon listed maintained warehouse stocks and your answer was they maintained stocks for resale. Does that mean that they maintain—that the stores listed on that exhibit maintain wholesale stocks or warehouse stocks for resale?

A. No, not wholesale or warehouse stock in that sense.

Q. What do you mean?

A. Stock in the sense of selling retail.

Mr. Welch: That is all.

Mr. Wright: I have just one or two questions on that subject.

Recross Examination by Mr. Wright.

Q. Those stores sell to contractors and painters, do they not?

A. Yes.

3867 Q. Are those also sold direct by the Sherwin-Williams Company in some instances?

A. No.

Q. The company does not sell direct to paint contractors?

A. It is not their policy to.

Mr. Welch: I object. The question was asked contractors and painters. The question is now contract painters. Contractors and painters are different classifications, and contract painters are something else again.

Trial Examiner Norwood: Clarify that, please.

By Mr. Wright:

Q. Does the Sherwin-Williams Company sell to paint contractors direct?

A. No, it is not their policy to sell direct.

Q. Do they sell to industrial accounts for their own consumption and use in maintenance?

A. Yes, they sell direct to industrial accounts for maintenance.

Q. Do the retail stores also sell direct to industrial accounts?

A. To some of the smaller businesses.

Mr. Wright: No further questions.

Redirect Examination by Mr. Welch.

Q. Just one question. Do retail stores sell to
3868 painting contractors?

A. Yes.

Q. And do they sell to—

Mr. Welch: (Interposing.) Your Honor, will you permit us to have the recross examination repeated?

Trial Examiner Norwood: All right.

(The entire recross examination was read by the reporter.)

Mr. Welch: I believe I have no further examination.

Trial Examiner Norwood: Thank you, Mr. Lemke.

(Witness excused.)

Trial Examiner Norwood: Call your next witness.

STANLEY LANDGRABE was thereupon called as a witness for the Respondents, and having been first duly sworn, testified as follows:

Direct Examination by Mr. Welch.

Q. Will you give your full name for the record, please?

A. Stanley Landgrabe.

Mr. Welch: Will you mark this, please?

(The paper referred to was marked Respondents' Exhibit 209 for identification.)

Mr. Welch: And this the next number, please.

3869 (The paper referred to was marked Respondents' Exhibit 210 for identification.)

By Mr. Welch:

Q. Mr. Landgrabe, how long have you been employed by the Sherwin-Williams Company?

A. About 22 years.

Q. In what capacities have you been so employed?

A. Cost accountant and factory auditor.

Q. In what capacity are you now employed?

A. Factory auditor in charge of factory accounting.

Q. What is the scope of your present position?

A. To have charge of all factory accounting and audits that are necessary.

Q. To what extent, if any, does that include cost ac-

counting for the production of lead pigments and lead products?

A. To the extent it is one of the factors of Sherwin-Williams Company, and since I have control or supervision of all of it, it is just one of my duties.

Q. You have supervision of all the cost accounting?

A. Yes.

Q. Will you give us in some detail the experience that you have had in making determinations or findings as to Sherwin-Williams' cost of producing red lead?

A. Well, a number of years back, I was lead products bookkeeper for the Chicago plant, and since that
3870 time, I have worked in the controlling end.

Q. And have you had the lead products factory cost books under your supervision in the last few years?

A. Yes, sir.

Q. What grades of red lead do Sherwin-Williams produce, or did they produce, in the period 1932-1946?

A. 95 per cent, 97 per cent, 98 per cent.

Q. What difference is there, if you know, in the three grades of lead produced by Sherwin-Williams?

A. The difference is the number of hours required to burn the pig lead before the finished product is obtained.

Q. What about oxidation?

A. In the manufacture of red lead, it is a process of oxidizing pig lead.

Q. Is there any difference in the three grades other than the degree to which they have been oxidized?

A. No.

Q. Which way does oxidation run, upwards with the percentage?

A. The longer—

Q. (Interposing.) In other words, is 97 per cent red lead oxidized to a higher extent than 95?

A. That is right.

Q. And 99 to a higher extent than 97?

A. That is right.

3871 Q. How do you obtain that difference in oxidation?

A. Through the formula given us by the local factory upon their time studies.

Q. I don't believe you understood my question, Mr. Landgrabe. How do you obtain the difference in the oxidation between the three grades?

A. By the period it is in the furnaces.

Q. And what is your common name for that?
A. Burning time.
Q. Is that the time by which that process is known?
A. Yes.
Q. Now, is there any other factor that enters into obtaining the 95 or 97 or 98 per cent grades other than the burning time?
A. No.
Q. Do you know the size of the batches of red lead burned by the Sherwin-Williams Company at a single time?
A. Yes, usually 3,000-pound batches.
Q. Did the lead plant at Chicago ever make any time studies as to the relative length of time required to burn 95, 97, and 98 per cent red lead?
A. Yes.
Q. Are the results of those studies transmitted to your office in Cleveland?
A. Yes.
3872 Q. What were the results reported?
A. The results were to produce a batch of 3,000 pounds of red lead, 95 per cent, would require 24 hours' burning time; 97 per cent, 36 hours' burning time; and 98 per cent, 48 hours' burning time.
Q. Were the reports you received from the factory of such a character that you, as a cost accountant, would accept them as an authoritative basis for making up cost analyses?
A. Yes.
Q. To what extent have they been relied upon by Sherwin-Williams, if any, in the course of years in determining the cost of producing the three grades of red lead?
A. They have been relied upon to the extent that it is the only way we have of determining the cost of 95, 97 and 98 per cent red lead.
Q. Have you recently had occasion to determine the manufacturing cost for producing 95, 97, 98 per cent red lead on a per hundred pound basis?
A. Yes.
Q. Have you prepared any report showing this information for a particular period?
A. Yes, I have prepared a report showing the burning cost.
Q. I show you Respondents' Exhibit No. 209 for identification. Is that the report that you refer to?

A. Yes.

3873 Q. Now, will you tell us in detail just how you made the determinations that are indicated on that report?

A. I took the period January 1, 1945, to June 30, 1945, or six months.

Trial Examiner Norwood: Don't tell us anything on the exhibit. Just identify it. Tell us how you made it and we will put the exhibit in and let it speak for itself.

Mr. Welch: Your Honor—

The Witness: (Interposing.) This report was reproduced from information supplied direct from the white lead factory, plus information retained in our home office.

Trial Examiner Norwood: All right.

Mr. Welch: I offer Respondents' Exhibit 209 in evidence.

Mr. Wright: I would like some preliminary cross-examination on it.

Mr. Welch: I will ask a few questions that may solve the problem.

Trial Examiner Norwood: Go ahead.

By Mr. Welch:

Q. Do you have with you the reports from the plant which indicate the items of expense that you have referred to such as maintenance and repairs, power, fuel, sundries?

A. Yes.

Q. Can you give—what did you do to get those figures?

3874 A. Yes.

Q. What does the word "service" mean?

A. Labor, productive or nonproductive.

Q. Do you have the tabulations from which that item was taken?

A. Yes.

Q. Do you have the reports from which you took the poundage for the various months of January through June, 1945?

A. Yes.

Mr. Welch: Do you want to see those before your preliminary examination?

Mr. Wright: Off the record.

Trial Examiner Norwood: All right. Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. Wright: I have no objection to the exhibit.

Trial Examiner Norwood: Received as marked, Respondents' Exhibit 209.

(The paper referred to, heretofore marked for identification RESPONDENTS' EXHIBIT 209, was received in evidence.)

By Mr. Welch:

Q. Mr. Landgrabe, will you tell us first where you got the information—strike that. Will you tell us where
3875 you got the information as to the total number of pounds of 95 per cent red lead and the total number of pounds of 97 per cent red lead manufactured in the period January 1, 1945, to June 30, 1945?

A. From monthly operating reports supplied by the factory or the lead processing factory.

Q. And those reports have been reproduced here today, have they?

A. Yes.

Q. Now, when you come to the item, "Burning service and expense," what does the term "service" mean?

A. It means all labor, both productive and nonproductive.

Q. Then, the expense items are maintenance and repairs, is that right?

A. Yes.

Q. Power, fuel, and sundries?

A. Yes.

Q. Now, you have a column headed June 30, 1945, to date. Does that mean January 1, 1945, to June 30, 1945?

A. No. By that, I refer to September 1, 1944, to June 30, 1945.

Q. So then in order to get the period that you have in your third column, January 1, 1945, to June 30, 1945, what do you have to do?

A. It was necessary to deduct the period Septem-
3876 ber 1, 1944, to December 31, 1944.

Q. And what column is that series of figures in?

A. The middle column.

Q. Now, are all the figures—where did you obtain the figures that are in those two columns?

A. Directly from our monthly operating reports.

Q. Have those reports been made available in the hearing today?

A. Yes.

Q. Coming down to the item "Total service and expense," I find in the third column the figure 7,253.24. Does that represent the total service and expense for producing the total poundage of 95 or 97 per cent lead referred to in the first series of figures up in the heading "Red lead produced"?

A. It refers to the total burning cost of producing—

Q. (Interposing.) That many pounds?

A. Yes.

Q. The next item is burning or furnace hours. Will you tell us for 95 and 97 per cent lead, will you tell us just how you made that calculation to obtain the total number of furnace hours shown?

A. By using the time studies supplied by our manufacturing factory, that is 24 hours to burn 95 per cent, 36 to burn 97 per cent, and with the results of a 3,000-
3877 pound output of red lead, we converted the total quantity produced to the number of batches, multiplied by the number of hours to produce the various grades per batch to determine the total furnace hours.

Q. Now, when you come to the item headed "Burning costs per hour," how did you arrive at that figure?

A. The total burning hours divided by the total burning cost will equal the cost per burning hour.

Q. Do I understand that it is hours divided by cost, or cost divided by hours?

A. Cost divided by hours.

Q. Now, will you come to the item "Burning cost, 95 per cent lead on a hundred pound basis." How did you determine that?

A. After I secured the cost per hour, I multiplied by the number of hours to produce the 95 per cent red lead to secure the total cost of burning.

Q. Then, you reduced that to a hundred pound basis?

A. That is then reduced to a hundred pound basis.

Q. Did you follow the same formula to determine the burning cost of 97 per cent red lead?

A. Yes.

Q. Can you tell us what the variable factors are in the cost of manufacturing 95, 97, and 98 per cent red lead?

A. The variable factors are the number of hours
3878 the different grades burn.

Q. Have you entered on this report all of the items that enter into burning expense?

A. Yes.

Q. Now, do you know what the term "burden" means from an accounting point of view?

A. Yes, it is the additional expense the company has to operate aside from actual production cost. That is speaking from the manufacturing factory standpoint. As far as sales, they have their own burden, but I am speaking of from a factory standpoint.

Q. Will the burden vary with the three grades?

A. Definitely, yes.

Q. In what direction would it vary?

A. It would vary depending upon the quantity of each that can be produced. In other words, 95 per cent red lead can be made in 24 hours while 97 per cent would take 36 hours and 98 per cent would take 48 hours, or the production for 95 per cent in any given period would be twice that of 98 per cent.

Q. So your burden per hundred pounds for 97 per cent would be higher or lower than that for 95?

A. Higher.

Q. How much higher?

A. Oh, it is in proportion. That all depends on
3879 how you distribute burden, but naturally the more you can produce, the less your cost is going to be and that cost is reflected also in the burden.

Q. Now, on a per hundred pound basis, is the burden on 98 per cent higher than the burden on 97 per cent?

A. On 98 per cent, it would be higher than 97 per cent.

Q. Now, the figures and work that you have done do not include burden, do they?

A. No, this is just the—

Q. (Interposing.) So that any difference in burden in producing the three grades would be in addition to the three figures shown on Respondents' Exhibit 209?

A. That is right.

Q. Now, based upon the work you have done in preparing this chart which is shown as Respondents' Exhibit 209—strike that, please.

Why do you not have any entries under the 98 per cent column on Respondents' Exhibit 209?

A. No 98 per cent was produced.

Q. Now, based—

A. (Interposing.) During the dates shown there.

Q. Now, based on the study that you have done, what

is your opinion as an expert cost accountant in this particular field as to the extent to which the cost of producing 98 per cent red lead would exceed the cost of producing 3880 97 per cent per hundred pounds?

Mr. Wright: Objection, your Honor. He hasn't been established here as an expert cost accountant to testify as to opinion testimony.

Trial Examiner Norwood: I think he may—

Mr. Wright: (Interposing.) It may be—

Trial Examiner Norwood: You may tell us anything you know based on your experience, but I think you can figure out some difference here from what he has already told us and this table.

Mr. Welch: I thought I would like to get it in the record in the form of his direct testimony.

Trial Examiner Norwood: I will let him tell it. Objection overruled.

Mr. Wright: Furthermore, this calls for a conclusion.

Trial Examiner Norwood: Don't just speculate on it.

Mr. Wright: He can't answer from his own knowledge by the question. The question called for his opinion.

Mr. Welch: I will modify the question to say from your own knowledge, taking into account the same formulas you used in demonstrating the difference between 95 and 97 per cent.

The Witness: Will you please read the question 3881 over to me?

Trial Examiner Norwood: Read the question, please.

(The reporter read the question.)

The Witness: I would say that from my own experience, the actual cost is more to produce 98 per cent than 97 and more to produce 97 per cent than 95 per cent.

By Mr. Welch:

Q. How much more would it cost?

A. That all depends upon the burning costs per hour.

Q. Well, on a ratio the same ratio that was used in this table, how much would it have cost you to produce it had there been the same burning expense?

A. On a ratio basis, it would cost one and a half times as much to manufacture—no, half again the manufacture 97 per cent red lead over 95, and twice as much for 98 per cent.

Q. That is, 98 per cent would cost twice as much as 95 per cent, is that your testimony?

A. Yes.

Q. That is due to the fact that the burning time is approximately twice as long?

A. That is correct.

Q. And the factors that you took into account are the factors that arise in connection with the burning?

3882 A. That is right.

Q. Now, in connection with your cost accounting work, have you made any analyses of the differences in the cost of containers?

A. Yes.

Q. Just a minute. For 100 pounds, 50 pounds and 25 pounds and 12½ pounds containers for lead in oil?

A. Yes.

Q. What was the basis for such an analysis?

A. The basis for the contracts were the—the contracts with the supplier of the containers.

Q. Do you have those contacts?

A. Yes.

Q. Did you prepare any written analysis of such contracts to show the differences per hundred pounds of lead in oil for the various containers from hundred pound kegs down to and including 12½ pound pails?

A. Yes.

Q. I show you Respondents' Exhibit No. 210 for identification and ask you if that is the analysis that you refer to?

A. Yes.

Mr. Welch: We offer it in evidence.

Mr. Wright: I would like some preliminary cross-examination.

3883 *Cross-Examination by Mr. Wright.*

Q. Do those contracts from which the figures were taken include all the terms and conditions of the transactions by which you purchased those products?

A. Yes.

Q. There are no other documents affecting them?

A. No.

Q. Or agreements affecting those contracts?

A. No.

Q. In any way?

A. No.

Q. Do those contracts cover these containers supplied with lithograph labels?

A. Some of them.

Q. In Exhibit 210?

A. Yes.

Q. With covers?

A. That is right.

Mr. Wright: I have no objection to the exhibit.

Trial Examiner Norwood: Exhibit 210 of the Respondents is received.

(The paper referred to, heretofore marked for identification RESPONDENTS' EXHIBIT 210, was received in evidence.)

3884 *Direct Examination (Continued) by Mr. Welch.*

Q. Now, for what years did you prepare this study?

A. Well, there was no specific year. The contracts are drawn up for whatever—the statement is drawn up—

Q. (Interposing.) I have one for 1942, one for 1943.

A. That is correct.

Q. And you have the cost for how many containers and covers?

A. For a hundred containers and covers.

Q. In what different sizes?

A. Twelve and a half pounds, twenty-five, fifty, and hundred pound packages.

Q. What did you do, then, after you had the cost per hundred containers to translate it into the cost of a hundred pounds of lead in oil?

Mr. Wright: Objection, your Honor. There is no statement that that is the cost of a hundred pounds of lead in oil.

Mr. Welch: The document at the head shows white lead in package cost, and the information later is the cost per hundred pounds.

Mr. Wright: There has been no explanation of whether it is a hundred pounds of cans or what.

By Mr. Welch:

3885 Q. What does the item "cost per hundred pounds" mean?

A. The cost per hundred pounds referred to per hundred pounds of material.

Q. In such containers?

A. In such containers.

Q. All right, now, how did you arrive at that amount?

A. Well, to arrive at the costs per hundred in fifties, it requires two fifty-pound containers to fill one hundred pounds of the white lead in oil; therefore, since your container cost is 37.3 cents per container, the cost per hundred pounds would be 74.7 cents.

Q. And you use the same formula throughout in arriving at the cost per hundred pounds?

A. Yes.

Trial Examiner Norwood: Now, that means that in the fifty-pound can the cost of the container and the cover is 74.7 cents?

The Witness: That would be for two fifty-pound containers of white lead in oil.

By Mr. Welch:

Q. Are there any other factors which would increase the cost of Sherwin-Williams of preparing the smaller size containers as compared to the hundred-pound container?

A. Yes, your filling and finishing would depend on the size of the container.

3886 Q. Do they increase or decrease as the size of the container decreases?

A. The cost increases as the size of the container decreases.

Trial Examiner Norwood: Off the record.

(Proceedings off the record.)

Trial Examiner Norwood: All right, go ahead.

By Mr. Welch:

Q. Why would that last answer be true?

A. Because of the simple fact that you cannot sell two pint milk bottles with water at the same time you can sell one quart milk bottle. The same applies in filling any packages, the smaller the package you wish to fill with a required amount of material—it will take longer to fill the small packages than the larger.

Trial Examiner Norwood: How about the sealing of cans, the cover of the container?

The Witness: That becomes a part of the increased cost, too.

Mr. Welch: Your witness.

Cross-Examination (Continued) by Mr. Wright.

Q. Mr. Landgrabe, speaking of burden, I believe you testified that was the same as overhead.

A. Yes.

3887 Q. You mean general administrative overhead?

A. That is right.

Q. None of that would be an organizational burden, would it?

A. That is the reason I stated that overhead, the factory cost, the supervision, fixed charges that cannot be directly pro rated to the produced article such as rents, supervision, and so forth.

Q. Why did you select this particular period represented on Respondents' Exhibit 209?

A. The reason I selected that, our regular procedure as far as monthly operating reports is to retain them only for a two-year period. That is month by month. To secure the information necessary to verify those reports—what actually happened was I had to have recourse to the only information that was available.

Q. Are you familiar with the six months' period of the red lead manufacturing operations?

A. You mean the period—

Q. (Interposing.) January, 1945, through June, 1945.

A. I am not any more familiar with that period than any other period.

Q. Did you have any occasion during that period to be familiar with the conduct of the manufacturing operations in the red lead department?

3888 A. No.

Q. Was that in every way a normal manufacturing period as far as costs were concerned?

A. Yes.

Q. There were no unusual operating or manufacturing expenses that were incurred in that period?

A. Not to my knowledge.

Q. Did you make any effort to determine whether that was the case?

A. Well, from observation of our actual costs at other times, I would say that there is no—actually no variable difference of any concern in this period.

Q. It is true, isn't it, that in a period as short as six months, your manufacturing costs in any department can vary considerably due to unusual operating conditions?

A. That is the reason I took six months' period. The differences would be better—it gives a better picture than one month.

Mr. Wright: No further cross-examination.

Trial Examiner Norwood: What does this show as to the actual cost of a hundred pounds shipped in fifty-pound containers over that same hundred pounds shipped in a hundred-pound container?

Mr. Welch: You deduct this from this 21.7 cents.

Your Honor, we have a short stipulation.

3889 Trial Examiner Norwood: All right.

Mr. Welch: It is stipulated by counsel for the Commission and counsel for the Respondent, Sherwin-Williams Company, that if the witness Sutherell who testified yesterday were recalled to the stand today, he would testify that the rate from Dallas to Union, Mississippi, on January 25, 1943, in LCL quantity would be $1.16 per hundredweight, according to Peel's ICC-3361, and Fife's ICC-28, and that the rate from Dallas to New Orleans, Louisiana, on the same date in LCL quantities was $1.17 per hundredweight per Peel's ICC-3527 and Fife's ICC-28.

Is it so stipulated, Mr. Wright?

Mr. Wright: I so stipulate.

Mr. Welch: That is all.

(Witness excused.)

Mr. Welch: We have no further witnesses that the Respondent, Sherwin-Williams Company, proposes to produce at this hearing, so at this time we are not in position to say we have closed our defense. I will state, however, if we do put in other businesses, they will be put in after the contemplated hearings in Washington and New York and as far as we now know, we do not anticipate requesting any specific hearings for the purpose of further evidence by this Respondent.

Trial Examiner Norwood: Anything further?

3890 Mr. DuBose: We have a number of out of town witnesses who can get here, get to Washington more easily in the middle of the week than they can at the beginning of the week.

Trial Examiner Norwood: Is there any further request as to these hearings?

I want to give counsel notice as I expect us to continue without further intermission until all the evidence is re-

ceived in this case, that is without further intermission except for November 4 which is Election Day, and if we adjourn over from the Washington hearing, we will reconvene on the 5th and continue without any cessation.

Mr. Wright: I will endeavor to accommodate myself to that and any rebuttal witnesses that I call will be called immediately following the close of the Respondents' testimony.

Trial Examiner Norwood: I invite attention to the notice I have sent counsel about the necessity of conserving time on this case and ask them to please cooperate in every possible way.

By request and agreement of counsel, the hearing is now adjourned to reconvene the taking of further testimony in Washington, D. C., on the 29th day of October, 1947, in the office of the Federal Trade Commission, Room 332, or otherwise, as may be posted on the bulletin board, at 10:00 o'clock A. M. on that date.

Mr. DuBose: Thank you, your Honor.

Mr. Welch: That will be all right with us, your Honor.

(Whereupon, at 3:30 o'clock, p. m., October 17, 1947, the hearing in the above-entitled matter was adjourned.)

3892

Hearing Room,
Federal Trade Commission,
Washington, D. C.,
October 29, 1947.

Met, pursuant to adjournment, at 10:15 a. m.

Before:

J. W. Norwood, Trial Examiner.

Appearances:

Joseph S. Wright, Attorney for the Federal Trade Commission.

E. Z. DuBose, Attorney for the Respondent National Lead Company. (120 Broadway, New York, New York.)

3893 Edmund T. Wood, Attorney for the Respondents Eagle-Picher Lead Company and Eagle-Picher Sales Company. (American Building, Cincinnati, Ohio.)

Henry E. Gardiner, Attorney for the Respondents Anaconda Copper Mining Company and International Smelting & Refining Company. (120 Broadway, New York, New York.)

James T. Welch, Attorney for the Respondent The Sherwin-Williams Company. (815 15th Street, N. W., Washington, D. C.)

3894 PROCEEDINGS.

Trial Examiner Norwood: The hearing will come to order.

Pursuant to adjournment on the 17th of October at Cleveland, Ohio, the hearing in Docket 5253 is now convened in Washington, D. C., Office of the Federal Trade Commission, Room 332 at 10 o'clock a. m. on October 29, 1947.

The appearances are as follows:

Edmund T. Wood, representing Eagle-Picher Company and Eagle-Picher Sales Company.

E. Z. DuBose, representing National Lead Company.

Henry E. Gardiner, representing Anaconda Copper Mining Company and International Smelting & Refining Company.

James T. Welch, representing The Sherwin-Williams Company.

Joseph S. Wright, representing the Federal Trade Commission.

Mr. DuBose: Mr. Matthiessen, will you resume the stand?

C. S. MATTHIESSEN was thereupon recalled as a witness for the respondents National Lead Company, and, having been first duly sworn, testified as follows:

Direct Examination (Resumed) by Mr. DuBose.

3895 Q. Mr. Matthiessen, I show you Respondents' Exhibits 165-A to O, inclusive for identification, and 166-A and B, which were identified by you at the time of the hearing in Washington on June 12 of this year, and I call your attention to the fact that at those hearings you testified as to poundage and freight, but stated that you had not checked cartage figures.

Pursuant to my request, have you recently checked the cartage figures which appear on these exhibits that I have just mentioned?

A. I have.

Q. And at that time you had in your possession these other exhibits, is that correct?

A. Yes.

Q. Now, when you refer to cartage figures, are those the figures which appear on Respondents' 166-B, among other exhibits, under the heading, "Par-T" and opposite the word, "cartage" with respect to each month.

A. Yes, sir, they are the net cartage figures for that particular month.

Q. I show you Respondents' Exhibit 165-A to O, inclusive for identification, and do the figures opposite the words, "cartage", which appear as to each month on Respondents' Exhibit 166-B for identification also appear on these work sheets, which are the work sheets for the 3896 month by month tabulations.

A. That is right.

Q. Now, will you tell us from what source the cartage figures, which appear on Respondents' Exhibit 166-B for identification, were taken, from what sources?

A. They were obtained in an entirely different manner than the freights. They are an accumulation of the total costs of the operation of our trucks, plus the purchase of new trucks, plus the write-offs for those trucks each year, divided by 12, and they are the wages paid to the drivers, the helpers, the overtime, the gas, the oil, and everything else applicable to the operation of those trucks.

Q. Now, the trucks also; you say our trucks. You refer to the trucks owned by the John T. Lewis Company in Philadelphia?

A. That is right.

Q. Now, trucks also carry other materials than white lead in oil, is that correct?

A. That is correct.

Q. Do you make any allocation of the trucking costs to white lead in oil, and how do you do it?

A. That is obtained in this manner: At the end of each month, all of our figures are computed to a pound basis, and the total number of pounds are taken and divided into the total costs for the operation of those 3897 cars, thereby getting a rate of freight to charge against the cartage. Then for white lead in oil, we have that rate, and we multiply that by that rate to obtain that cartage figure.

Q. If I understand you correctly, then, you take the monthly total poundage or production by John T. Lewis Company of all products?

A. That is right.

Q. And divide it into the figure which you have for cartage for that month?

A. That is right.

Q. And get the unit cost per pound?

A. That is right.

Q. And with that you then multiply it by the number of pounds of white lead produced that month?

A. That is right.

Q. To get the applicable cartage applied to white lead in oil.

A. That is right.

There is one other item there which we have a credit on. For all the weight that we take by our trucks to railroads,

platforms or stations, we are allowed a credit of five cents, which is deducted from the cartage for white lead.

Q. In other words, the railroads give you that credit?

A. That is right.

3898 Q. Now, taking these figures opposite the word "cartage", which appears in the recapitulation of the work sheets for each month, Respondents' Exhibit 166-B, are those figures taken from any particular source?

A. Oh, yes, definitely.

Q. What is the record in your office?

A. Well, the record in our office is obtained from our distribution of expenses.

Q. And is that a record kept in the regular course of business?

A. Yes, sir.

Q. And it reflects the cartage attributable to white lead in oil, for instance, for each month?

A. For that particular month.

Q. Now, I notice that cartage charges apply only to par territory.

A. That is right, for our trucks never operate out of par territory.

Q. And the John T. Lewis Company pays no trucking costs, as such, outside of par territory, is that correct?

A. That is correct.

Q. I also note on Respondents' Exhibit 166-A for identification, under the general heading, "1941 Sale of heavy and soft paste white lead", the last column to the right is headed, "Prt. per Cwt." Should that "Prt" be "Frt"?

A. That certainly should. That is freight.

3899 Q. That is a typographical error.

A. That is a typographical error.

Q. Now, Mr. Matthiessen, have you available at John T. Lewis Company in Philadelphia, or in the company's warehouses, all of the invoices which you testified about last June, and all of the cartage figures and all of the records showing tonnage of white lead in oil sales for 1941?

A. We have.

Q. And will those records be made available to anyone in the Federal Trade Commission who wishes to examine them?

A. Yes, sir.

Q. And will you, upon reasonable notice, be able to help whatever investigator comes from the Federal Trade Commission to examine those records?

A. I certainly will.

Mr. DuBose: At this time I offer in evidence Respondents' Exhibit 165-A to O, inclusive for identification, and Respondents' Exhibit 166-A and B for identification.

Mr. Wright: I would like preliminary cross-examination for identification.

Trial Examiner Norwood: What is the purpose of these exhibits?

Mr. DuBose: I think we stated it last time, but to recapitulate, these records show what the Philadelphia branch of the National Lead Company's average freight costs
3900 for white lead in oil sales for 1941 are, and they show what the average freight per hundred pounds in par territory is, what the average freight is, plus one-eighth, and similar figures for plus three-eighths territories for white lead in oil for the year 1941, and last June this witness rather exhaustively identified all of the figures on these work sheets, except the cartage figures, and he at that time stated that he had not checked those figures, but in the meanwhile he has checked them.

Trial Examiner Norwood: Counsel may go ahead with his preliminary questions.

Cross-Examination by Mr. Wright.

Q. What is the geographical territory which is the plus three-eighths zone described in Exhibit 165-A which the Philadelphia branch ships, Mr. Matthiessen?

A. In our territory it consists of, I would say, two-thirds of North Carolina to the east; about 85 per cent of South Carolina, and the town of Augusta, Georgia.

Q. From Augusta, Georgia, east in Georgia?

A. No, the only time that—The only town that we have that we operate in is Augusta, Georgia.

Q. You don't have any other customers in Georgia except that one town?

A. That is the only town, sir.

3901 Q. Do you have any accounts in Florida that are included in that?

A. No, not with our branch. That is taken by New York.

Q. So then the three-eighths zone you are speaking of is only eastern North and South Carolina and Augusta, Georgia?

A. That is right.

Q. What is the one-eighth zone that appears on this exhibit?

A. The one-eighth zone is the state of Virginia.

Q. Do you sell in the western part of Virginia from the Philadelphia branch?

A. We sell as far over as Roanoke, Virginia.

Q. You don't sell in the plus twenty-five cent zone of Virginia?

A. No, sir.

Q. Now, getting to this Exhibit 165-A, in the column headed "Voucher", with these numbers, what are those numbers, Mr. Matthiessen?

A. Those numbers are the numbers of our vouchers where we, say, for illustration, pay the Pennsylvania Railroad, with an accumulation of possibly a week's accumulation of invoices to us, and they are gathered together and we make one check for that entire voucher.

Q. And that is a freight voucher?

A. That is a freight voucher.

Q. What are the products which the John T. Lewis
3902 Company sells throughout the territories covered by this exhibit?

A. Well, in the paint industry we sell dry white lead, white lead in oil, dry red lead, red lead in oil, ready-mixed red lead, linseed oil of all descriptions, dry colors, colors mixed in oil—That is a paste color—and various other items like lead mixing oil, flattening oils, and then we have a metal department where we ship all types of babbit solders, sheet lead, lead pipe, pipes in bends, and things like that.

Q. Now, these vouchers from which you procured this information, what appears on the face of these vouchers?

A. We have a book called Disbursement of Expenses, and in this book is listed the voucher number applicable to white lead. I only picked the vouchers where we had white lead, payments of white lead accounts, and I took possibly, during the course of 1941, several thousand vouchers out and examined them, and the records that I have there are exact copies of the invoices we paid for white lead.

Q. Now, what appears on the face of these vouchers now?

A. What do you mean by the face of the voucher?

Q. What figures appear on those vouchers?

A. Well, the amount chargeable to white lead, the amount chargeable to oxide, the amount chargeable to linseed oil.

Q. Is each product separated on the face of the voucher itself?

3903 A. Yes.

Q. On the freight voucher?

A. Yes.

Trial Examiner Norwood: Well, is this all for shipments of 100 pounds or less?

The Witness: I don't quite get your question, sir.

Trial Examiner Norwood: The freight information you are giving here, and these shipments you have indicated here on these vouchers, particularly shipments in freight, are they all on shipments of 100 pounds or less?

The Witness: One hundred pounds or more?

Trial Examiner Norwood: Or more?

The Witness: Yes.

Trial Examiner Norwood: None less than a hundred pounds?

The Witness: We never ship less than a hundred pounds. We ship no less than 500 pounds.

Trial Examiner Norwood: All right, go ahead.

By Mr. Wright:

Q. Then the amount allocated to each product appears on the face of the original voucher in the Distribution of Expense book?

A. Yes, sir.

Q. And you then did not include any freight or cartage which could be allocated to any other product in the

3904 figures that were represented on this exhibit?

A. No. We checked each voucher to find mistakes, if any occurred.

Q. So that these sheets here show the amount of freight and cartage allocated to each of those vouchers, is that correct?

A. That is right.

Q. Where did you get your total figure of sales over this period?

A. That was taken from another book entirely, where we took the total pounds of white lead in oil sold for that particular month.

Q. You did not check any original invoices to determine those sales?

A. Oh, yes.

Q. You went back to the original invoices, then?

A. Yes.

Q. You did not take—

A. (Interposing.) Excuse me, please. Let me tell you this: Before we pay each freight bill, they are very carefully checked as to pounds. Then it goes to the Traffic Department to be checked as to freight rate. Then the extension is checked. If everything else is correct and that bill is correct, it is set aside for payment.

Q. But you checked, then, each original invoice 3905 to get the total pounds sold in each territory?

A. I did not check each original invoice. I checked each original freight bill.

Q. And that is where you get your figures which are on Respondents' Exhibit 165-A to O, inclusive.

Now, calling your attention to Respondents' Exhibit 166-A, where total pounds sold are set forth and compared with the figures that you derived from 165-A, exactly what document or from what document did you get those figures?

A. We got those from the sales records.

Q. Which were in what form?

A. I don't know that, sir.

Q. Did you get them out of a book that had a line showing so much pounds sold during July or August or something?

A. Yes, sir.

Q. Now, how was that broken down territorial?

A. That was not broken down territorial.

Q. How do you separate the sales in plus one-eighth and plus three-eighths from the par sales?

A. From our freight invoices, knowing the territories.

Q. Well, will you explain that in detail as to the technique you used in doing that?

A. Well, we have a set territory for par territory, which is north of Washington, D. C., including up to our upper part, which takes in Trenton over to Point 3906 Pleasant; up through Wilkes Barre and down along the Susquehanna, all through Maryland, and takes in the state of Delaware and that section of Maryland, including Washington, D. C., is our par territory.

Now, where the freights go over comes in the Virginia

territory, and where the freights go higher still is in North and South Carolina and Augusta, Georgia.

Q. What I would like you to do, Mr. Matthiessen, is tell us just how you got this figure of 1,100,000 pounds sold in the plus one-eighth and the 1,231,600 pounds sold in the plus three-eighths.

A. We divided that up by the territories.

Q. Well, now, you did not look at the original invoices?

A. No, we did not look at the original invoices. They were all done right up in our office. We have all those figures right up in our office for you, sir.

Q. Well, now, I appreciate that.

What I want to know is exactly how you did this now. Where did you get these pounds? Did you get those from the freight vouchers you are talking about now?

A. No, we didn't get the pounds from the freight. They were already checked beforehand. They were definitely checked when that bill was passed for payment. That is when they were checked.

Q. Now, you stated to me that you got this figure 3907 on total pounds sold from a sales record and said, for instance, one million pounds sold during July, 1941, and that sales record did not say where those pounds were sold.

A. But they are. We have that record right up in Philadelphia.

Q. The sales record, as it is entered there, shows the locality in which those things are sold?

A. Yes.

Q. By zone or by state or in what fashion?

A. By zone.

Q. They are set up that way?

A. Yes.

Q. Kept regularly that way in the regular course?

A. Yes, sir.

Q. Over how long a period of time have you done that?

A. Since about, I would judge that was around '27 or '28 when that started, somewhere in there.

Mr. Wright: I have no further preliminary cross.

Trial Examiner Norwood: I want to ask you about this par territory. Just what does that par territory, as you have used it in these tabulations, cover?

The Witness: That covers where we do not charge any excess for freight.

Trial Examiner Norwood: I know, but I mean what states? I want to know which one of the maps which
3908 are in evidence that I can compare this to.

Mr. Wright: May we got off the record, sir?

Mr. DuBose: Commission's Exhibit 580 shows the white lead in oil.

Mr. Wright: May we go off the record, your Honor?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: Is there any objection to the exhibits?

Mr. Wright: Yes, your Honor, I want to object to the exhibits on the ground of relevance. Certainly they have nothing to do with the basic charge here of fixing and maintaining prices and monopolistic position, because they can't conceivably affect that in any way. Secondly, I want to object to their reception as to count two in the sense that they purport to show averages of many individual transactions, which certainly are no defense as to a charge of transaction in specific transactions which fall within groups and classes.

Mr. DuBose: If your Honor please, other exhibits of this same nature have been admitted in evidence, and I should think to get a complete picture, they should be admitted under the same general ruling.

Trial Examiner Norwood: I will receive them subject to connection, that is, by the addition of other information
which may be taken together with that to throw some
3909 light on what the average freight is in the various zones.

Mr. DuBose: That is our purpose, your Honor; not to show an isolated branch, but to try to get all the branches and show an overall picture.

Trial Examiner Norwood: The objection is overruled, and the exhibits are received as stated.

(EXHIBITS NO. 165-A TO O, INCLUSIVE AND 166-A AND B were thereupon received in evidence.)

Mr. Wright: I have no further cross-examination.

Trial Examiner Norwood: Thank you, Mr. Matthiessen.

(Witness excused.)

Mr. DuBose: Could we have a short recess?

Trial Examiner Norwood: We will take a five-minute recess.

(A short recess was taken.)

Trial Examiner Norwood: Come to order.
Call your next witness.
Mr. DuBose: Mr. Hesselbrock recalled.

J. H. HESSELBROCK was thereupon recalled as a witness for the Respondents National Lead Company, and, having been previously duly sworn, testified further as follows:

Direct Examination (Resumed) by Mr. DuBose.

Q. Mr. Hesselbrock, I call your attention to the fact that in the hearings in New York on June 18 of this year,
3910 through you were introduced in evidence Respondents' Exhibit 169-A to N, inclusive, which you identified and explained at that hearing.

I call your attention to the fact that on the summary sheet, so-called, Respondents' Exhibit 169-A, opposite the heading or the notation "Par Plus One-Fourth", which you at that time explained was par plus one-quarter territory for white lead in oil, and under the heading, "Total Pounds Sold", opposite that notation are the figures 306,037½. Are those the total pounds sold by the Cincinnati branch in 1941 for white lead in oil in the par plus one-quarter territory for white lead in oil?

A. Yes, sir, they are.

Q. And in that connection, I call your attention to the minutes of June 18, page 3145, to the question:

"Yes. In other words, you obtained the pounds sold in the par plus one-quarter and par plus three-eighths zone, respectively, and the total of that is listed here for the par plus one-quarter zone of 3,306,370½ pounds, is that correct?

"A. That is correct."

Is that figure 3,306,370½ correct?

A. No, it is not.

Q. What should it read, and I refer you to Respondents' Exhibit 169-A.

3911 A. It should read 306,037½ pounds.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Mr. DuBose: That is all. Mr. Hesselbrock is presented for cross-examination.

Cross-Examination by Mr. Wright.

Q. Mr. Hesselbrock, the Cincinnati branch is merely a billing branch of the National Lead Company for these products, is it not?

A. For the white lead in oil and oxide products, yes.

Q. It does not, then, ship to any of the customers?

A. Well, we warehouse in Cincinnati, and we do ship from there.

Q. Over how wide an area do you ship from that Cincinnati warehouse?

A. Well, throughout the entire territory, the Cincinnati branch territory, I should say.

Q. That would include the territory all the way down to the Gulf of Mexico?

A. No, it is a portion of Indiana, Ohio, all of Kentucky, a portion of Tennessee, a portion of Virginia and West Virginia, North Carolina, South Carolina, Alabama and Georgia.

Q. Then any LCL shipments of these products would be shipped to the customer from the Cincinnati
3912 branch warehouse rather than directly from the factory involved?

A. Not necessarily.

Q. How do you determine that as a matter of general practice?

A. Well, that is determined in an effort to save as much freight as possible.

Q. Do you have any other warehouses in the Cincinnati branch territory?

A. Just in Atlanta, Georgia, our own plant there. The warehouse has small quantity shipments into Atlanta.

Q. How do you serve the territory in Alabama, Mississippi, and other parts of Georgia?

A. Well, we make no shipments into Mississippi, but in Alabama and Georgia practically all the shipments are from another branch, direct LCL shipments.

Q. Now, going back to 169-A and this total pounds sold in the par zone during 1941, you have a figure of 3,000,794 pounds. Where did you get that figure, from what specific record?

A. That figure was gotten from a specific record. That was obtained by difference. We did obtain the par plus a quarter and par plus three-eighths figures from actual in-

voices into those territories. The par figure was obtained by difference.

Q. Well, difference from what?

A. From the total sales during the year 1941.

Q. In other words, the figure then of 3,000,794 is
3913 derived by deducting what you found in the par plus a quarter and par plus three-eighths from the total figure?

A. From the total sales.

Q. Then in your area you don't keep your sales broken down into par plus a quarter or plus three-eighths, as the previous witness testified they did in the John T. Lewis branch?

A. We do not keep them separate.

Q. What is your office technique or branch technique for handling the freight charges which have been borne by the other branches in shipping to customers in your branch territory?

A. Well, we are billed for the exact amount of freight which another branch would pay for our account for a shipment to one of our customers.

Q. Now, how are those figures reported to you, as total figures?

A. No, they are involved as individual charges on individual shipments.

Q. Well, now, suppose a shipment included flatting oil, linseed oil, and dry red lead, as well as heavy paste white lead, how does the figure come to you, say, from the St. Louis branch?

A. Each item is billed as an individual product.

Q. Separate?

A. Separately.

3914 Q. So then these figures on freights which are added here were taken from those actual billings in each case?

A. In each case, sir.

Q. Did you work out a difference on par, a quarter and three-eighths on freight factors, as you did on the pounds sold?

A. Yes, we did.

Q. You did that in the same way, then?

A. That is right.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

By Mr. Wright:

Q. What is 169-D, Mr. Hesselbrock?

A. Those are the numbers of the vouchers on which freight was recorded.

Q. In what area is that applicable?

A. That would be our complte charge for freight for 1941 chargeable to the white lead in oil department. It would cover all territories.

Q. I call your attention to the statement on 169-B, "Through agents, 3,371,397, and then the figure 89.49 per cent. What is that figure and that description?

A. I don't quite understand your question. You are referring to the pounds or to the percentage?

Q. Well, both the pounds and the percentage.

3915 A. On our net sales statement for the year 1941, which shows the total sales of white lead in oil, the sales were broken down into the sales through agents and to other purchasers.

Q. Now, in this figure appearing on 169-A, average freight per cent per hundredweight in the par zone, .514, is there included in that figure the inbound freight rate from the producing plants that serve the Cincinnati branch warehouse?

A. Yes, the inbound freight is included in that figure.

Q. In other words, in figuring your average freight per hundredweight in the par zone, in calculating that as to shipments from the Cincinnati warehouse, you went back of the actual freight incurred from the Cincinnati warehouse, and also took your inbound freight from Chicago, say, to Cincinnati?

A. That figure was obtained by difference, and the freight was originally charged against the white lead in oil department, and since that figure would not appear in the par plus quarter or par plus three-eighths zones, it would automatically appear in the par freights.

Q. Where is the Cincinnati warehouse customarily served from, what factory?

A. Well, it is served from several, St. Louis, Chicago, and in emergencies from Philadelphia.

Q. And all of the inbound freight, then, on that ma-

3916 terial would appear in this tabulation which you have made here in 169-A?

A. It would.

Q. Because it is charged to the Cincinnati branch warehouse.

A. That is right.

Q. Is cartage included in this?

A. Well, the only cartage we would have would be in the City of Cincinnati itself, and that is par territory, and that again would automatically appear in the par freight.

Q. Is your cartage in the Cincinnati local territory now done in your own trucks, or is that in hired carriers?

A. Well, it is done in our own trucks except in cases of emergency.

Q. Now, are the cost factors for your own trucks included in this total figure, so that they are reflected in this .514?

A. They are included in the total figures, yes, sir.

Q. Do you ever in an emergency fill an order in the Cincinnati branch that might be in the territory of another branch?

A. We have in emergencies.

Q. Where would those pounds appear? Are they compensated in this?

A. Those pounds were not included in these sales. Those would be included in the sales of the other branch.

3917 Both pounds and dollars of freight would be charged to that branch.

Q. Now, your oxide calculations, then, were made in exactly the same way, I take it?

A. In the same way, yes, sir.

Q. Does your Atlanta plant ship any red lead throughout your territory direct?

A. Not in carload lots.

Q. Do they ship in less than carload lots?

A. They do if it is warehoused there.

Q. I am talking now about materials produced in Atlanta.

A. Are you speaking now of 1947 or 1941?

Q. Well, we will speak, say, of 1945.

A. Well, in 1945 they began to manufacture oxide in Atlanta.

Q. And ship and sell them throughout that area?

A. That is true.

Q. They were not in production in 1941?

A. No, sir.

Q. When did they reach production of any consequence?

A. In 1942 or 1943 that plant started to operate.

Q. Do they make a complete line of oxides?

A. Just battery oxides.
Q. What is that, litharge and red lead?
A. Uncalcined litharge and negative plate litharge.
Q. Do they make any mixture that contain a cer-
3918 tain percentage of red lead with the litharge?
A. No.
Q. They don't make what is commonly known as positive?
A. Positive, yes, but that is uncalcined litharge.
Mr. Wright: I have no further examination.
Trial Examiner Norwood: Off the record just a moment.
(Discussion off the record.)
Mr. DuBose: Nothing further.

(Witness excused.)

3919 Trial Examiner Norwood: Let's go back on the record and let Mr. DuBose make his complete proposal as to the schedule.
Mr. DuBose: Your Honor, at this time I should like to respectfully move that the hearings be adjourned until November 6, at which time we propose, subject to Your Honor's approval, to have hearings on November 6 and 7 in Washington, and thereafter to adjourn to New York for November 10, 12, 13, 14, and 15 if need be, at which time, subject to Your Honor's approval, the hearing will be held in Room 10 of the Bar Association Building, 42 West 44th Street, New York, at which time all of Respondents hope to be able, and fully expect to be able, to put in all of the remaining testimony.
Trial Examiner Norwood: Is that agreeable to you, Mr. Wright?
Mr. Wright: Yes, sir. And I might add that if there is any time remaining in that week I may be able to complete any testimony evidence that I might want to offer in rebuttal. If not, I intend to complete it in the following week.
Trial Exmainer Norwood: Now, I want to repeat what I previously said to counsel, and repeat my urgent request that if they have any appeals which they might want to make under Rule 20, to go on the record on this immediately after all the evidence has been received, and also to have their proposals so that they may be presented not
3920 longer than one week after the close of the testimony.
At least I shall request that. Maybe we will have to take ten days, but I think we can do it in a week.

Is there anything further?

(No response.)

Trial Examiner Norwood: The hearing is now adjourned to reconvene in Washington, D. C. in Room 332, Federal Trade Commission, at ten o'clock a. m., Eastern standard time, on November 6.

Mr. Welch: November—what?

Trial Examiner Norwood: November 6, at ten o'clock a. m., with the understanding that we will follow the proposed schedule as far as may be possible.

(Whereupon, at 11:30 o'clock a. m., October 29, 1947, the hearing in the above-entitled matter was adjourned, to reconvene at 10 o'clock a. m., November 6, 1947, in Room 332, Federal Trade Commission, Washington, D. C.)

3921 Hearing Room 532,
Federal Trade Commission,
Washington, D. C.,
November 6, 1947.

Met, pursuant to adjournment, at 10:00 a.m.

Before:

J. W. Norwood, Trial Examiner.

Appearances:

Joseph S. Wright, Attorney for the Federal Trade Commission.

Paul R. Dixon, Attorney for the Federal Trade Commission.

3922 E. Z. DuBose and James D. Ewing, Attorneys for the Respondent National Lead Company. (120 Broadway, New York, New York.)

Edmund T. Wood, Attorney for the Respondents Eagle-Picher Lead Company and Eagle-Picher Sales Company. (American Building, Cincinnati, Ohio.)

Henry E. Gardiner, Attorney for the Respondents Anaconda Copper Mining Company and International Smelting & Refinining Company. (120 Broadway, New York, New York.)

Robert Mathis, Attorney for the Respondent The Sherwin-Williams Company. (815 15th Street, N. W., Washington, D. C.)

3923 PROCEEDINGS.

Trial Examiner Norwood: The hearing will come to order.

Pursuant to adjournment on October 29, the hearing in Docket 5253 is now reconvened for the taking of further testimony in Room 532, Office of the Federal Trade Commission, Washington, D. C., at 10:00 o'clock a.m. on the 6th day of November, 1947.

The appearances are as follows:

Edmund T. Wood, representing Eagle-Picher Company and Eagle-Picher Sales Company.

E. Z. DuBose, reperesenting National Lead Company.
James D. Ewing, representing National Lead Company.
Henry E. Gardiner, representing Anaconda Copper Mining Company and International Smelting & Refining Company.
Robert Mathis, representing The Sherwin-Williams Company.
Joseph S. Wright, representing the Federal Trade Commission.
Paul R. Dixon, representing the Federal Trade Commission.

Call your witnesses, gentlemen.

Mr. Ewing: We will recall Mr. McNair.

Trial Examiner Norwood: Mr. McNair is recalled for cross-examination, is he not?

3924 Mr. Ewing: He testified before.

Trial Examiner Norwood: Yes. Mr. McNair, you have been sworn?

Mr. McNair: Yes.

Mr. Ewing: We are recalling him not only for cross-examination but for further direct.

Trial Examiner Norwood: All right.

JOHN GORDON CRAWFORD McNAIR was thereupon recalled as a witness for the respondent National Lead Company, and having been previously duly sworn, testified as follows:

Direct Examination (Resumed) by Mr. Ewing.

Q. Mr. McNair, when you testified here last June, you identified this document, as I recall it, which I have in my hand, and which is marked Respondent's Exhibit 158 for identification, which I show you. That document, as I recall your testimony, was prepared by you, is that right?

A. Yes, sir.

Q. Now, will you tell us briefly exactly what that shows.

A. This chart goes back for a number of years and shows the various selling schedules of companies that were taken into the National Lead Company at the consolidation of the National Lead Company, and since that time is the National Lead Company.

Q. Well now, when you say companies that were
3925 taken into the National Lead Company, you are referring to the incorporation of National Lead, is that correct?

A. That is true.

Q. And when you say companies that were taken in, do you mean all of the companies that became a part of National Lead or—

A. No, sir, only those companies who were taken in and eventually became the Atlantic Branch.

Q. Now, do you know offhand what those companies were, or some of them?

A. Well, the Brooklyn White Lead Works, the Ulster White Lead Works, the Jewett White Lead Works, the Atlantic White Lead Works, Robert Colgate & Company, the Union Lead Company—that is about all, I think.

Q. Now, you have said that you prepared this chart, as you call it, yourself. From what records did you prepare it?

A. From scrapbooks that we had in the office.

Q. And have you those scrapbooks here?

A. Yes, sir.

Mr. Ewing: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: Are you ready now, gentlemen?

Mr. Ewing: Yes.

3926 By Mr. Ewing:

Q. These scrapbooks, Mr. McNair, that you produced, are the source of the information set forth on Respondents' Exhibit No. 158 for identification?

A. Yes, sir.

Q Now, you spoke of Respondents' Exhibit No. 158 for identification as setting forth the Atlantic Branch and its predecessors' selling schedules, I believe. Do you mean that Respondents' Exhibit No. 158 for identfication purports to set forth each and every price change?

A. No, sir.

Q. When you say selling schedules, will you tell us exactly what you mean.

A. It means the different methods they have had in selling white lead, as to whether there was a discount, a rebate, the general set-up of a selling policy.

Q. In other words, rather than setting forth the history of the selling schedules of the Atlantic Branch and its predecessors, this document which is marked Respondents' Exhibit 158 for identification purports to set forth only what you call its selling policies as they were put into effect from time to time?

A. That is true.

Q. And am I correct in understanding that all the information that appears on Respondents' Exhibit 158 for identification is taken from these scrapbooks that
3927 you have produced here this morning?

A. Yes, sir.

Mr. Ewing: I offer Respondents' Exhibit 158 for identification.

Mr. Wright: I would like some preliminary cross-examination, your Honor.

Trial Examiner Norwood: All right.

Voir Dire Examination by Mr. Wright.

Q. Mr. McNair, I note in the first column, to the left of this exhibit, that there are prices listed prior to 1890. As I understand it, the National Lead Company was organized and incorporated in 1890.

A. In 1891 and 1892, I think it was.

Q. I see. Now, whose prices are those which appear on this prior date to the date of the incorporation?

A. They appear in those books.

Q. Well, will you tell us whose prices those were?

A. Those prices were obtained from those constituent companies that we took in at the time of the formation of the National Lead Company.

Q. In other words, they were predecessor companies of the National Lead Company?

A. I gave them in my testimony.

Q. Were they predecessor companies of the Na-
3928 tional Lead Company?

A. That's right.

Q. Out of which National was formed?

A. That's right.

Q. Well now, did they quote prices together as a unit in that period or did each company have different price lists?

A. I don't know, sir. The records will speak for themselves.

Q. Well, I am asking you now what this exhibit purports to show.

A. This exhibit shows the selling schedule or the policy of those companies—

Q. Well—

A. —by the National Lead Company.

Q. Does that represent the policy of all of them or of a particular one of them?

A. Well, they were taken from the particular ones shown in the book there.

Q. Well now, as I understand your testimony, you don't recall whether that was from a particular one or from the common quotations of the constituent companies.

A. I hadn't looked at those books since I made this chart up some 12 or 14 years ago.

Q. This purports to show, then, every change in a discount or selling practice as reflected in the price cards, from this beginning date up to the present time, is that correct?

A. As far as I could ascertain from the records.

3929 Q. Did I understand you to say you made this up 12 or 14 years ago, Mr. McNair?

A. About that time, yes.

Q. Mr. McNair, you didn't indicate on this exhibit anying about how freight was handled at various times?

A. No, sir.

Q. The charges to customers?

A. No, sir.

Mr. Wright: Off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. Wright: I am willing to withhold objection if these matters can be admitted subject to reasonable opportunity of examining the basic data, and the right next week in New York, if I require it, to recall this witness for further cross-examination on the basis of the basic data.

Mr. Ewing: Yes.

Trial Examiner Norwood: If agreed to, the exhibit is received in evidence so condtioned.

(The paper referred to, heretofore marked for identification RESPONDENTS' EXHIBIT 158, was received in evidence.)

Trial Examiner Norwood: The prices that are named on that exhibit, are they fo.b. prices or what?

The Witness: Well, I think—

3930 Trial Examiner Norwood: Delivered prices?

The Witness: I think, your Honor, they are all delivered prices. To 37 years of my knowledge, all those prices have been delivered.

Trial Examiner Norwood: All delivered prices?

The Witness: And I imagine the same thing existed years before that.

Mr. Ewing: I take it that subject to the suggestion made by Mr. Wright, the exhibit will be received.

Trial Examiner Norwood: Yes, it has been received. Proceed.

Direct Examination (Continued.)

Q. Mr. McNair, I call your attention to the fact that in Respondents' Exhibit 158 at times reference is made to white lead in oil and at times reference is made simply to white lead. Does the information contained in the exhibit relate entirely to white lead in oil?

A. Yes, sir.

Q. So that whenever a reference is made solely to white lead, that means white lead in oil as far as that paper is concerned?

A. White lead in oil.

Q. Now, I ask you to look at the lefthand column on the exhibit, and in particular the entry dated December 13, 1880, and the next entry dated January 21, 1884, in each of which the word "rebate" or "rebates" appears, and

3931 ask you to tell us what those words "rebate" or "rebates" mean.

Mr. Wright: Your Honor, I am going to object to that question in its present form. This is a question of a witness as to what a word may or may not have meant in 1877 or 1180, which is obviously beyond his knowledge or experience.

Mr. Ewing: Oh, I will amend the question by adding "if you know."

Trial Examiner Norwood: He may tell us what he understands in the light of his knowledge of the affairs of these companies, or what he understands the term "rebate" to mean.

The Witness: If the counselor will refer to the second column, the period of April 26, 1918, he will see that at that particular time the ¼ cent rebate was discontinued.

Having been with the company at that time, I am well aware of the fact of what the word "rebate" means.

It simply means that at the end of the year, if the customer had bought a certain quantity of white lead, he was entitled to a rebate of so much per pound on his yearly purchases.

By Mr. Ewing:

Q. So that was not a current discount, as you might say, but it was based upon the total purchases of the particular year by a particular customer?

A. That is correct.

3932 Q. Now, I call your attention to the second column from the left and to the entries under the date April 26, 1918, and in particular to those relating to 2,000 pounds, 5 ton, and car lots, and ask you to tell us what the discount shown on the exhibit means.

A. The customer buying in 500 pound lots for delivery at one time received a 10 per cent discount from the list price; 2,000 pound lots for delivery at one time, 10 and 2½ per cent; 5 ton lots, 10 and 5 per cent; and carload lots, 10 and 6 per cent.

Q. Well now, when you say that in case of carload lots it was 10 and 6 per cent, is the 10 per cent a discount from list price?

A. The list price. The discounts are taken off the list price, 10 per cent off, and then 6 per cent off of that.

Q. And when you say 6 per cent of that, what figure do you have in mind?

A. The list price.

Q. Six per cent of list or 6 per cent of list less 10 per cent?

A. No, if the list price—let's see if it is shown here. The list price at the time in question was $12.50 per hundred pounds. You would take 10 per cent off of that, and then, in the case of carload lots, an additional 6 per cent.

Q. Off—

A. Off of the list price.

Q. Off list price?

A. The list price, yes.

3933 Q. Now, in that same second column, I direct your attention to the last entry under date of November 18, 1920, and ask you to explain the discounts shown there.

A. Well, the same explanation would apply to that as it does against the others.

Q. The only difference being the amount of discount shown?

A. The difference in discounts, that is all.

Q. And you show those differences in the discount as a variation in the selling policy?

A. Selling schedule, that's right.

Q. Now, I ask you to look at the first entry in the third column under the date of April 24, 1930, and ask you to explain the discounts shown there.

A. That was the same with the different schedule of discounts allowed.

Q. Now, in that same column, if you will look under the various headings, you will find references to painters, dealers, and agents, and the references to painters and dealers in that column are the first to appear on that document. In other words, they did not appear in either the first or second columns.

A. You have reference to the bracket March 1, 1935?

Q. Yes, and the subsequent one marked January 1, 1937. Will you tell us what those classifications meant as far as the Atlantic Branch was concerned.

A. Those were the schedule of prices at which 3934 our agents were authorized to sell at, the suggested retail price to painters and dealers.

Q. Now, did the Atlantic Branch at that time sell so-called painters and dealers direct?

A. No, sir.

Q. And at that time the Atlantic Branch was operating on the agency or consignment plan which, if I recall your testimony correctly, first started in the first part of 1932, or the latter part, rather.

A. Demember 30, 1932, I think it was.

Q. Now, with respect to that same entry, there is a heading "Agents" and I see there that there are three classifications. Will you explain these three classifications.

A. The A classification were those distributors that bought in very large volumes.

Q. When you say "bought" you mean prior to the agency, is that correct?

A. Prior to the agency. Then, when we established the agency price, of course they were our distributors and those were the distributors of our products that ordered—that we delivered to them large tonnages of white lead.

The B classification is a distributor that got a lesser quantity and the C classification was the smallest agent.

Q. Now, as far as you know, did any other branch of National Lead Company similarly classify its agents?

3935 A. Yes, sir.

Q. After January 1, 1937—and I believe you will find an entry of that date relating to "Agents all"—did Atlantic Branch classify agents?

A. After that date, sir?

Q. Yes.

A. No, sir, they were all put on the same basis.

Q. Now, I direct your attention to the last two entries in that column, relating to the first and second advances of March 1, 1937, both of which refer to discounts to the trade, and ask you to tell us what in that exhibit you mean by the trade.

A. In that particular case the trade would be the painters, property owners, or any consumer that would buy in those quantities.

Q. Now, I refer you to the last two entries in the third column in which you will note in each case there is a reference to list, and these appear to be the first entries in that exhibit relating to list, and I ask you to tell us what you meant by list.

A. What column is that, counselor?

Q. The last two in the third column.

A. March 1, 1937?

Q. In each you will see there is a reference to list, with a price.

3936 A. That is the list price for white lead in oil.

Q. When you say list price, tell us what you mean. To whom is that price charged?

A. Well, the list price as such was subject to a discount if the dealer or painter bought in certain specified quantities as shown here.

Q. Well, who paid the list price, if anyone?

A. Yes, I would say so. A property owner, a casual purchaser of white lead, would pay the list price.

Trial Examiner Norwood: The consumer would pay that, is that right?

The Witness: A consumer, a property owner.

Trial Examiner Norwood: Would pay that to the retailer?

The Witness: That's right.

By Mr. Ewing:

Q. That is the price I would pay if I went in any store?

A. That's right.

Trial Examiner Norwood: Then this product is sold to distributors and dealers at a certain discount from list, is that right?

The Witness: Not at the present time, sir. We have a flat price.

Trial Examiner Norwood: You mean when those entries were made?

3937 The Witness: That's right.

Trial Examiner Norwood: The entries that you were just speaking of?

The Witness: Yes. I would like to correct that, your Honor. At that particular time that we are referring to, we had agents at that time and they were distributors for the National Lead Company, but when the agency plan of selling was discontinued, then they bought at an established price.

By Mr. Ewing:

Q. Now, if you will look at that exhibit you will see that at times price is expressed in terms of cents, and at times price is expressed in terms of dollars. When it is expressed in terms of cents, to what weight does it refer?

A. Per hundred pounds.

Q. Cents?

A. Cents per pound.

Q. Cents per pound.

A. In the case of dollars, dollars per hundred pounds.

Q. In the first and second columns, and in the third column prior to those first two entries in which "list" appears, you will find various references to a white lead price as distinguished from a quantity price or a discount. Will you tell us whether those references to price are list price references.

A. If I understand you correctly, where it shows—say, on November 18, 1920, there is shown on here "White 3938 lead—14¼ cents a pound."

Q. That's right.

A. That is a list price.

Q. So that although the word "list" first appears at the end of the third column, prices theretofore appearing in the third column and in the first two columns are in effect list prices?

A. That is correct.

Q. Now, I direct your attention to the entry in the fifth column under date of June 7, 1946 and I ask you whether on that date National Lead Company, in distributing and selling white lead in oil, was operating on the so-called agency or consignment plan.

A. No, sir.

Q. Now, I call your attention to the fact that in that entry under the date of June 7, 1946 and in every entry on your exhibit thereafter, there is a reference to "list," "painters," "dealers," and "distributors."

Will you tell us what outfit you classified as distributors as distinguished from dealers and painters?

A. Those are the accounts that we sell dir ct.

Q. Do you sell the so-called dealer and painter accounts direct?

A. No, sir.

Q. And when you—when I say "you" I am referring to the Atlantic Branch, as I suppose you assume.

3939 A. I assume so, yes, sir.

Q. And the Atlantic Branch does not sell list direct, is that correct?

A. You mean at the list price?

Q. Yes.

A. No, sir.

Q. What is the significance of the listing in that exhibit of what will appear to be prices to list, painters, and dealers?

A. Those are the suggested resale prices that we recommend to our distributors to sell that particular class of trade.

Q. And did you make similar recommendations to your agents during the time the agency plan was in effect?

A. Yes, sir.

Mr. Ewing: I have no further direct examination.

Trial Examiner Norwood: Cross-examine.

Mr. Wright: Off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: We will take a five-minute recess.

(A short recess was taken.)

Trial Examiner Norwood: Now, will you make a little statement for the record?

Mr. Ewing: Yes, sir. I respectfully request that the hearing be adjourned until tomorrow morning at 10:00 o'clock for the purpose of permitting counsel to consult with counsel for the Commission with respect to a stipulation which we hope that we will be able to agree upon and enter into that will save a substantial amount of time as compared with the other method of introducing the same proof.

Trial Examiner Norwood: Is that agreeable to you, Mr. Wright?

Mr. Wright: Yes.

Trial Examiner Norwood: Recessed until 10:00 a.m. tomorrow morning when we will reconvene in Room 388.

(Whereupon, at 12:00 o'clock noon, November 6, 1947, the hearing in the above-entitled matter was adjourned, to reconvene at 10:00 o'clock a.m. November 7, 1947 in Room 388, Federal Trade Commission, Washington, D. C.)

3941

Hearing Room 388,
Federal Trade Commission,
Washington, D. C.,
November 7, 1947.

Met, pursuant to adjournment, at 10:00 a.m.

Before:

J. W. Norwood, Trial Examiner.

Appearances:

Joseph S. Wright, Attorney for the Federal Trade Commission.

E. Z. DuBose and James D. Ewing, Attorneys for the Respondent National Lead Company. (120 Broadway, New York.)

3942 Edmund T. Wood, Attorney for the Respondents Eagle-Picher Lead Company and Eagle-Picher Sales Company. (American Building, Cincinnati, Ohio.)

Henry E. Gardiner, Attorney for the Respondents Anaconda Copper Mining Company and International Smelting & Refining Company. (120 Broadway, New York, New York.)

James T. Welch, Attorney for the Respondent The Sherwin-Williams Company. (815 15th Street, N. W., Washington, D. C.)

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PROCEEDINGS

Trial Examiner Norwood: The hearing will come to order.

Pursuant to adjournment, the hearing on Docket 5253 is now reconvened in Room 388, Office of the Federal Trade Commission, Washington, D. C., at 10:00 o'clock a.m. on the 7th day of November, 1947.

Please note the appearances.

Will Mr. McNair resume the stand?

Mr. Ewing: Yes.

Trial Examiner Norwood: Do you wish to cross-examine him, Mr. Wright?

Mr. Wright: Yes.

Trial Examiner Norwood: Proceed.

JOHN GORDON CRAWFORD McNAIR was thereupon recalled as a witness for the respondent National Lead Company, and, having been previously duly sworn, testified as follows:

Cross-Examination by Mr. Wright.

Q. As I understand it, Mr. McNair, this exhibit, Respondent's Exhibit No. 158, was made up from the basic data contained in these four large scrapbooks which have been submitted, is that correct?

A. That is correct.

3944 Q. Does it reflect all the changes in pricing policy and discount policy which appear in these volumes?

A. No, sir, it does not. It only reflects those changes in the selling schedules.

Q. What do you mean by selling schedules? Do you mean the discounts off of list?

A. The various selling schedules.

Q. It doesn't necessarily reflect, then, changes in the method of handling freight charges, differentials?

A. No, sir, nothing to do with freight whatsoever; nothing to do with freight.

Mr. Wright: Off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record. Proceed.

By Mr. Wright:

Q. Mr. McNair, I call your attention to a statement, in the earliest of these books, of delivery and equalization points of the Atlantic White Lead and Linseed Oil Company, dated May 10, 1889, which states that, "Until further notice we will allow freight on Atlantic lead to, and equalize freight with the following points * * *" and then lists Birmingham, Mobile, and Montgomery, Alabama, Washington, D. C., Jacksonville, Florida, Atlanta, Georgia, Augusta, Georgia, Macon and Savannah, Georgia, New Orleans, Baltimore, Charleston, South Carolina,

3945 Richmond, Virginia, Norfolk, Virginia, Wheeling, West Virginia, Austin and Dallas, Texas, Fort Worth, Houston, San Antonio and Waco, Texas, and also a list of some 34 or 35 points in New York, 11 points in New Jersey, and 3 points in Pennsylvania.

You were with the Atlantic Branch and with the National Lead Company, I believe you stated, since approximately 1910, is that correct?

A. That is correct.

Q. How do the practices with which you were familiar at that time when you first came with the National Lead Company, with regard to freight equalization and delivery, compare with those that I have called your attention to as being in effect in May 1889?

A. Well, we had equalization points and delivery points at the time I came to the company.

Q. Similar points as are set out in that exhibit of 1889?

A. That's right. Whether or not they are identical with those I don't know, but some of them are.

Q. Now, I direct your attention to a document which appears in this earliest book here, which appears to be a notice to the trade on prices of these various lead pigments by the National Lead Company, the Atlantic Branch, in January 1894, January 1, 1894, and the statement, "F.o.b. at New York; freight—all prepayment of or allowance for freight on lead is discontinued."

Now, that practice as set forth in that exhibit did 3946 not obtain when you first came with the company, did it?

A. No, sir, it did not, to my knowledge.

Q. Now, I call your attention to the fact that in the second oldest of these volumes, pages 140 and 141, there are price cards of the Atlantic Branch on white lead and oxides, February 21, 1924, which quote white lead, dry and in oil, in 100-pound kegs, at 14¾ cents per pound, and the Dutch Boy Red Lead in Oil at 16¼; and also to a card appearing in the same place, under date of February 22, 1924, by the National Lead Company of California, San Francisco, which quotes Dutch Boy White Lead Dry or in Oil, in less than 500-pound lots, at 14¼ cents per pound, and Red Lead in Oil in less than 500-pound lots at 15¾ cents per pound.

That would indicate that there was a half-cent differential on the Pacific Coast below the prices in the Atlantic Branch. Do you know anything about that situation that applied at that time?

A. No, sir, I do not.

Q. But the cards do indicate that to be the case?

A. It would indicate that, yes.

Q. I call your attention to the material appearing on page 14 of the book which contains the pricing from the latter part of 1931 on, to the quotations appearing in the card dated December 28, 1931 on lead pigments and oxide of the National Lead Company, Atlantic Branch, and
3947 the fact that there does not appear to be any quantity discount appearing on dry white, the basic carbonate, and basic sulphate as it appears in that quotation.

Is that correct?

A. You will have to repeat the question.

Q. That card of December 28 and the preceding card of December 14, appearing on the same page, do not indicate that there was any quantity discount applicable to the white pigments, dry, the basic carbonate, and the basic sulphate?

A. No, it would not indicate that.

Q. Was there such a quantity discount previous to that period of time, do you recall?

A. I couldn't recall now without referring to the records.

Q. I call your attention to what appears to be the next card in sequence on the white pigments, dry, carbonate, and basic sulphate, dated December 14, 1933, effective January 1, 1934. I call your attention to the statement there, "Less one-fourth cent per pound for 20 tons in one shipment."

It has been a policy to grant that one-fourth cent per pound for 20 tons in one shipment since approximately that time, has it not?

A. Well, it was at that time, and if it was granted it would be shown on subsequent price cards.

Q. Do you know whether such discounts were granted previous to that time?

3948 A. I couldn't say without referring to the records.

Q. What records would you want to refer to?

A. The price cards.

Q. These records here?

A. That's right.

Q. Well, would you refer to these records, then, and give us an answer to that.

A. How far back do you want to go?

Q. Well, as far back as you will need to go to determine where that thing was initiated.

A. I will have to keep going back until I find it.

Mr. Wright: Off the record.

(Discussion off the record.)

By Mr. Wright:

Q. All right.

A. I judge from this card dated December 28, 1931 that we didn't allow any quantity discount on quantity purchases at that time.

Q. I show you similar cards appearing back prior to that time, dated 1930.

A. There was apparently no quantity discount in effect at that time.

Referring to the card dated November 7, 1929, there is nothing to indicate thereon that we had a quantity discount at that time.

3949 Q. Wouldn't that indicate to you that that—

A. Well, the reason I wouldn't be able to answer that question, sir, unless I went all through the records, is because if you will note from this chart shown on Exhibit 158, we have adopted a certain selling policy, then we have discontinued it, and later on we have picked it up again, and I couldn't definitely say that the quantity discount on oxides would establish the date indicated here, whatever the date is.

Q. Dry white we were speaking of, rather than oxide.

A. Well, dry white lead. But where it was shown on the card that in 20-ton lots we allowed a ¼ cent rebate—

Q. Well, did you allow such a discount, it would appear on the card?

A. It would appear on the card. But the point I am trying to bring out is that we may have discontinued it at one time, or; going back all over the records, we may have given it an earlier date and then dropped it and taken it up again. I wouldn't know without going all through the records.

Q. Will you bear with me just a moment and we will go back a little farther than 1929 and you can look at these dry white cards then.

A. In the card effective July 10, 1929, there is no indication that we gave it at that time.

Effective November 20, 1928, it wouldn't indicate on the card that we gave it at that time.

3950 The card issued under date of September 9, 1927—there is no indication it was extended at that time.

On the card issued under date of March 2, 1923 there is no evidence that we gave a rebate, at that time, on quantity. On this particular card in question, there is a notation hereon which seems to be different from some of the others, that on dry pigment in kegs and barrels in quantities of one ton or more—

Q. Presumably there was a higher price on quantities of less than a ton in that instance there.

Now, you have examined these cards which had both the oxides and the white lead on them in prior years, back to 1923. I call your attention now to the price list dated May 28, 1935 for oxides and the expression on there, "Less ½ cent per pound for 5 tons in one shipment." From your examination of those previous cards, would that appear to be a new practice at that time?

A. I would assume so.

Q. Now, I also call your attention to the fact that there are two cards under that same date, one blue, and one yellow, both Atlantic Branch cards, and that the yellow card quotes prices which are ¼ cent higher correspondingly than the blue card. What is the significance of that, do you recall?

A. I wouldn't know, because I was not tied up in the oxide end of our business.

3951 Q. Well now, I show you corresponding blue and yellow cards of the Atlantic Branch under date of June 29, 1934, where the yellow card, which quotes prices ¼ cent higher than the others, is said to apply to Florida and Georgia.

A. I thought that might apply to Florida and Georgia. What is the question you want me to answer on this?

Q. I called your attention to those two cards. Does that appear to be a change in practice from what had previously obtained on the method of quoting on these oxides?

A. Well, this indicates that Florida and Georgia territories—there is a differential there of ¼ cent a pound over the New York area.

Q. Presumably that might explain the yellow card, ¼ cent higher, under date of May 28, 1934.

A. I would judge that, but it seems to be that Florida should be on there, but maybe the card was significant of the fact that it was a southern price card.

Q. I see.

A. I think that would be the answer.

Q. Now, calling your attention to Exhibit 158 again, here in this third column, under this card of March 1, 1935 which sets up three classes of agents, A, B, and C, with an apparent 15 cents per hundred differential between the three classes, will you point out where you obtained that information out of this basic data, Mr. McNair.

3952 A. Well, that information is not contained in here, except it may be in letter form.

Q. Now, I direct your attention to the agents' selling schedule appearing on page 51 of the third volume here, dated March 1, 1935, and to the other price lists which appear as of that date in the same place.

Is there any place in here where that differential between types of agents appears?

A. No, it doesn't appear on there. These agent prices here are a compensation which we paid to our agents for the distributing of our white lead, and it may have been given to them in a special—

Q. I call your attention to the document appearing on page 50, effective March 1, 1935, "Revision of first paragraph, Section 7, appointment of selling agency," which is a form for setting the price or agent's compensation there to your consignment agents.

A. There must be the notice that we informed the agent of his compensation. This must have been filled in here.

Q. But those actual figures that appear in there on that differential are not out of this basic data, are they?

A. I don't know whether it is shown somewhere else in here or not.

Q. Well, would you glance through it in that period of time and see if you can find it.

3953 A. I assume, counselor, that you looked all through here for that information, and if you say you couldn't find it, I will accept it as such.

Q. I would rather, since you prepared the document from this, have you satisfy yourself as to where it is, if you can find it there.

A. Understand, when this document was made up, it was made up with the idea to show the various changes in methods of selling white lead, and why it was made up, because I had the contention that there is nothing new under the sun. I showed in the record where we established a certain policy back 30 or 40 or 50 years ago, and the cycle has repeated itself, where we went back to the same policy.

Q. Yes. What I am trying specifically to find out is this: Somewhere you got those figures, $8.15, $8.30, and $8.45 which appear opposite the A, B, and C under that agent thing there.

A. Well, those figures were the actual basis of compensation that we were allowing our distributors.

Q. But that doesn't appear anywhere in these?

A. If you have looked for it and couldn't find it, I would say no, it is not in here.

Q. I have looked for it, and I haven't been able to find it. Well, what was the basis of your putting that in the exhibit, Mr. McNair?

A. Just to show what the selling policy was at that time.

3954 Q. Well now, what document did you get that out of?

A. Documents from our sales records out in the office.

Q. Can you produce those—

A. Sure.

Q. —and show that on that date and from that date until the date of the next card, January 1, 1937, that was the continuing policy of the company?

A. I am quite sure I can, yes.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: Proceed.

By Mr. Wright:

Q. Now, Mr. McNair, I call your attention to the document appearing here, the agent's selling schedule effective March 1, 1953, on page 51, and also to the March 1, 1935 entry under Respondent's Exhibit 158, to the classification, "Painters: Less than 500 pounds, ½ cent less than list price; 500-pound lots, one delivery, 1 cent less than list price; and 1,000-pound lots, one delivery, 1½ cents less than list price."

This was what the agent was required to sell your white lead in oil for, is it not?

A. That is right.

Q. Now, you also sold to him for his own account other keg products containing dry white lead, litharge, red lead in oil, and dry red lead, did you not?

3955 A. I assume so. We did not consign red lead or litharge or dry white lead to those.

Q. They were sold outright to the dealer?

A. They were purchased by him outright and he sold that at any price he wanted to.

Q. You did suggest, however, a list price and a painter price to him?

A. I would have to look at the card at that date to see whether we did or not. I doubt it on litharge or dry white lead, because it is the normal practice for a paint store to buy a 100-pound keg, stick it under the counter, and dish it out in bags or some other container when a customer wants to buy a small quantity.

Q. Well, I now direct your attention to the Form 1-B price list for agents, January 1, 1937, Dutch Boy—no, I withdraw it.

Now, in making up the quantities that appear in this designation under March 1, 1935, and which also appear in this agents' selling schedule here, were those quantities white lead in oil only?

A. Yes, that pertains to white lead in oil.

Q. In other words, to make a 1,000-pound lot in one delivery, it would have to be white lead in oil only?

A. That's right.

Q. Well now, I direct your attention here to a 3956 letter which appears under date of December 22, 1936, on page 72, signed by Mr. McNair, Assistant Manager, to Dutch Boy White Lead Selling Agents, and to the following statement:

"We refer to Item 4 relative to Price Card 1-B, covering Dutch Boy White Lead, Dry Red Lead, Litharge, and Red Lead In Oil. Formerly, we allowed our agents to include these products with Dutch Boy White Lead In Oil to make a total of 500 or 1,000 pounds and allow the quantity prices that applied to the quantities mentioned.

"This is to be discontinued after December 31, 1936. The 500 and 1,000 pound prices on and after January 1, 1937 will apply to Dutch Boy White Lead In Oil only. Dry white lead, dry red lead, litharge, and red lead in oil should not be included to make up orders for 500 or 1,000 pounds.

"If this is not perfectly clear, please get in touch with us at once."

Does that refresh your recollection about that situation any as it applied prior to January 1, 1937?

A. Prior to January 1, 1937? I would assume from this

letter that on and after that date the practice was discontinued.

Q. But prior to that date it did exist and they could make up their quantities as appearing in price lists?

A. They were made up in true.

Q. Well, this is the genuine document, is it not? Is that not your signature?

3957 A. Well, that is a replica of my signature.

Q. You have no reason for questioning the genuineness of that document or the accuracy of what is stated in it?

A. Not at all; not at all.

Trial Examiner Norwood: That document is not in evidence; you are merely using it to refresh his memory?

Mr. Wright: Well, may we go off the record a moment about this?

Trial Examiner Norwood: Yes. Off the record.

(Discussion off the record.)

Trial Examiner Norwood: Go ahead.

By Mr. Wright:

Q. Now, Mr. McNair, all of these prices that appear in Respondent's Exhibit 158 are prices to the trade and to dealers and so forth? There are no Government prices included in it?

A. No, sir.

Q. I direct your attention to the letter on the letterhead of the National Lead Company, Atlantic Branch, effective February 27, 1939, addressed to Dutch Boy White Lead Selling Agents and stating as follows:

"We are pleased to give you the following instructions relative to Government quotations. The prices you will quote for Dutch Boy White Lead In Oil are:

"On Bids Where Cash Discount Is To Be Shown, quote—

"Per Hundred pounds:

3958 "100-pound kegs—$10.25 less 2 per cent

"50-pound kegs—$10.50 less 2 per cent

"25-pound kegs—$10.75 less 2 per cent

"12½-pound kegs—$11.00 less 2 per cent.

"Where Your Bid Is To Be Net Cash, quote—

"Per Hundred Pounds:

"100-pound kegs—$10.045 net cash

"50-pound kegs—$10.29 net cash

"25-pound kegs—$10.535 net cash

"12½-pound kegs—$10.78 net cash.

"No further discounts of any kind are allowed. The above prices will apply to all Government bids regardless of quantity.

"By Government quotations or bids, we mean the Federal Government departments, State departments, Counties, Municipalities, or, in short, any sale that will be paid for with Government funds.

"All our agents will be governed by the above schedule and as it is our desire to have no misunderstanding, we wish you to get in touch with us if these instructions are not perfectly clear."

Do you recall the circumstances of sending out that letter?

A. Yes, sure.

Q. What led to that letter, can you tell us?

A: These agents of ours, representing the National Lead Company in selling our products, had to be
3959 guided as to what our policy was in selling Government departments that they would normally sell to. It is usually all in small lots. Big bids on Government, we handled direct ourselves.

Mr. Wright: I have no further cross-examination.

Mr. Ewing: No further examination.

Trial Examiner Norwood: Well, were those terms copied by either of the competitors?

The Witness: Not to my knowledge.

Trial Examiner Norwood: That policy with respect to Government bids?

The Witness: I wouldn't say so.

Trial Examiner Norwood: Thank you, Mr. McNair.

(Witness excused.)

Mr. DuBose: May we have a two-minute recess?

Trial Examiner Norwood: You may have a five-minute recess.

(A short recess was taken.)

Trial Examiner Norwood: Call your witness.

Mr. Ewing: Mr. McCarthy.

Trial Examiner Norwood: Mr. McCarthy, you have been sworn in this case, haven't you?

Mr. McCarthy: Yes.

F. K. McCARTHY was thereupon recalled as a witness for the respondent National Lead Company, and, 3960 having been previously duly sworn, testified as follows:

Trial Examiner Norwood: Will you give us your initials, Mr. McCarthy.

The Witness: F. K. McCarthy.

Direct Examination by Mr. Ewing.

Q. Will you tell us, if you recall, Mr. McCarthy, when Mr. Harold Rowe first was made a member of the Board of Directors of the National Lead Company.

A. It was April, '38 or '39, thereabouts.

Mr. Ewing: I ask that this paper be marked as Respondent's Exhibit 211 for identification.

(The paper referred to was marked Respondent's Exhibit 211 for identification.)

By Mr. Ewing:

Q. I show you this paper that has just been marked Respondent's Exhibit 211 for identification and ask you if you will read it and tell us whether it refreshes your recollection as to the date of Mr. Rowe's election to the Board of Directors.

A. It is a company news letter dated April 22, 1938, under the head of Board of Directors and Executive Committee.

Trial Examiner Norwood: Don't tell us what the paper is. Just tell us whether it refreshes your recollection.

The Witness: Yes, sir.

By Mr. Ewing:

3961 Q. Will you again give us the date upon which Mr. Rowe was first elected to the Board.

A. April 22, 1938.

Q. Now I show you the document which has been marked as Commission's Exhibit 615-A, 615-B, 615-C, and 615-D and ask you to read it over to yourself.

A. Yes, sir.

Q. That exhibit purports to set forth a price schedule as of April 26, 1941, which shows prices for railroad,

steamship, Government, State, and Municipal subdivisions, does it not?

A. Yes, sir.

Q. To whom was that exhibit issued in the National Lead Company?

A. The several branch managers.

Q. Were those price schedules in that exhibit, or similar schedules, ever published in the sense that they were published to the trade at large?

A. No, sir, those were for instruction of our branch officials, to guide them in quoting to these classes of trade.

Q. Then they are not, if I understand you correctly, similar to your price cards that were published to the trade?

A. Oh, no.

Q. National Lead sells some of the lead pigments in one-pound and five-pound cans, does it not?

A. Yes, sir.

3962 Q. Will you tell us what pigments are sold in those quantities.

A. Heavy paste white lead for the plumbing trade primarily is packed in one-pound and five-pound tins, which have to be shipped in cartons, and the large users of that were mill supply jobbers, wholesale hardware houses, and so forth, who distributed it then to retail channels for use by plumbers and people who used it for a calking compound and things of that nature.

Q. As compared with your other can or keg products, what differential in pricing is there with respect to the one-pound and the five-pound cans?

A. Because of package costs and nuisance and so forth, there was a substantial premium in the little one-pound cans over the 100-pound keg.

Q. In other words, you charged more for the one-pound can, relatively speaking, than you did for the keg of 100 pounds?

A. That is right.

Q. Now, you are familiar, are you not, with the sale by National Lead Company of dry white lead?

A. Yes, sir.

Q. What percentage of National's sale of dry white lead was represented, say in 1941, by sales in quantities of less than 500 pounds?

A. Possibly 2 per cent, but I would imagine much
3963 less than 2 per cent.

Q. Now, I show you, Mr. McCarthy, the bound volume consisting of sheets which are in evidence as Commission's Exhibit 752-A to 752-Z-144, and ask you to look at it and tell us whether you have ever seen that before.

A. Yes, sir.

Mr. Wright: If it will save time, I will stipulate that Mr. McCarthy assisted in the preparation and gathering of basic data on that matter.

Mr. Ewing: I appreciate your suggestion, but I am not going to be long.

By Mr. Ewing:

Q. Mr. Wright has just said that he would stipulate that you participated in the gathering of the data from which those tabulations were prepared by the Commission's representatives. In that connection, I ask you whether you, yourself, went over the invoices, which were collected by National from its various branches, involving the sale of white lead in oil to various customers during the periods indicated on that exhibit.

A. Each invoice?

Q. Well, substantially.

A. There were 55 pounds of them.

Q. Well, what would you say, roughly, was the extent to which you examined the invoices?

A. Well, as they came in, in response to the Com-
3964 mission's request, we classified them by geographical source and classification of trade, in order to speed up the work and cooperate with the Commission's investigators who were assigned to this task.

Q. And did you do that yourself?

A. Yes, sir.

Q. Now, what classification, for example, did you put the invoices in as you prepared them?

A. Obviously, agents accounted for the bulk of them. Then we had industrial accounts, railroads, manufacturers who would buy dry products. They accounted for practically all of the invoices.

Q. Now, when you classified these invoices that you went over, you did that prior to the submission of the invoices to the Commission's representatives, is that correct?

A. Yes, sir.

Q. When you classified them, did you do that work in accordance with National's policy with respect to trade classifications?

A. Definitely.

Q. Will you tell us whether, when, for example, you classified manufacturers—what was the principal consideration involved in that classification?

A. It would be the identity of the customer.

Q. Would the use to which he put the product

3965 have any bearing on it?

A. Yes, naturally.

Q. What can you tell us with respect to National's policy in classifying trade from the standpoint of competition as between classes?

A. Well, it has always been a very definite policy to treat each classification in a similar fashion, that is, to avoid discrimination or a conflict.

An agent, for example, had a certain basis. A paint grinder buying raw material for his own use would be on a different basis. An industrial account, buying our products for maintenance and not for resale would be in still a third category, and governmental or wholly tax-supported institutions, of course, were not conceivably in competition with any of these other classifications and they had a separate basis.

Q. Is it fair to say that to the extent that it was possible, you endeavored to include in each classification people who were similarly situated, and not to include some customer who was actually subject to a different classification?

A. That is right.

Q. And it was on that basis, was it, that you, yourself, to the extent that you did so, classified the invoices which formed the basis for this tabulation represented by Commission's Exhibit 752, and so forth?

A. The invoices were self evident.

3966 Q. Now, I take it from what you have testified to before that you were familiar, generally, with the sale by National of white lead in oil.

A. Yes, sir.

Q. Are you familiar with the sale by National of white lead in oil in the so-called par territory?

A. Definitely.

Q. What percent, would you say, of National's total white lead in oil business is represented by sales in par territory?

A. Over a period I would say the average was 75 to 80 per cent.

Mr. Ewing: No further direct examination.

Trial Examiner Norwood: Cross-examination.

Cross-Examination by Mr. Wright.

Q. Mr. McCarthy, in connection with the classification of customers that you were referring to on direct, in the preparation of this tabulation did you seek to determine into which of your various classifications the customers listed in this tabulation fell?

A. Yes.

Q. How did you seek to determine that?

A. By the face of the invoice; the identity, the firm name, the type of material, the size of the package.

Q. Did you also obtain from the branch offices in 3967 each case a list of the customers with whom business had been conducted over the period of time represented here, and with the designation of the class into which each of those customers fell?

A. I think that information was secured, too.

Mr. Wright: I would like to ask that these papers be identified as Commission's Exhibit 859-A, 859-B, 859-C, 859-D, and 859-E.

(The paper referred to was marked Commission's Exhibit 859-A through 859-E for identification.)

Mr. Wright: And I would like to ask that this document be marked as Commission's Exhibit 860-A, B, C, D, E, F, G, and H.

(The paper referred to was marked Commission's Exhibit 860-A through 860-H for identification.)

By Mr. Wright:

Q. Now, I hand you herewith the documents marked Commission's Exhibits 859 and 860 with sub-numbers, and ask you to examine them.

A. Yes.

Q. Do you recall those letters, or those documents, rather, Mr. McCarthy?

A. Yes, sir.

Q. What are they?

A. As I recall, Mr. Wright, the Commission asked for specific information from a list of a great many dif-
3968 ferent cities and towns and different parts of the country for specific periods, and my office then asked the branches to supply, from their records, invoices covering transactions during these periods and at these places, where they were available.

Q. Well now, was that request made and this information submitted during the course of the conversations about and the preparation of Commission's Exhibit 752-A and sub-numbers?

A. As I remember, yes, sir.

Q. And the information was gotten in connection with the transactions that were recorded in that document?

A. That is correct.

Q. Now, do those documents purport to list the classifications of the different types of accounts, as between manufacturer, industrial, agent, dealer, of those accounts listed there?

A. They do.

Q. Are those accounts which are sold by the National Lead Company?

A. Yes, sir.

Mr. Wright: I offer Commission Exhibit 859-A through 859-E, and Commission Exhibit 860-A through 860-H in evidence.

Trial Examiner Norwood: Any objection?

Mr. Ewing: I have no objection as far as the documents are concerned, but I don't know what they add, exaxtly, to the record, except ten or twelve more pieces of paper.

3969 Trial Examiner Norwood: How do they tie in with this big exhibit?

Mr. Wright: Well, may I ask the witness one more question about the exhibits, which isn't strictly identification?

Trial Examiner Norwood: Go ahead.

Mr. Wright: Well, no, I won't need to do that. It has already been answered.

Well, these exhibits show by the legend, which appears on 859—and the legend is explained on 860-H, which classifies each of these accounts as a dealer, a painter, an industrial, an agent, or railroad—what they are. There

has been testimony here that the National Lead Company didn't sell direct to dealers, that they confined their sales only to agents, and it was brought out in direct examination of this witness that the customers, in so far as possible, who were competitive were kept in the same class.

Now, it is my opinion that this is direct evidence on that issue since it sets out, on the basis of the respondent's own figures, what the situation was.

Mr. Ewing: My point is: Doesn't it all appear already in this other big exhibit, where there is each heading? There is the heading "Agents" and then the number of names appearing, and then "Dealers," and a number of names, and then "Industrials," and so on.

3970 Mr. Wright: Well, in order to get the information out of this big exhibit on the classification of customers, it is necessary to go through over 200 pages, and I am not sure it is as complete in the basic exhibit as it is in these few sheets which set the thing up.

There was already admitted into evidence a similar document relating to the Cincinnati Branch, in view of this witness' previous testimony that in that branch they did not sell to dealers.

Trial Examiner Norwood: Has the witness explained to us what those red pencil marks are on 859?

Mr. Wright: The witness was asked on direct if these purported to distinguish between the various classes of customers in those categories. Now, the documents themselves explain what those marks mean. There is a legend showing what a "A" means and what "D" means and what "P" means and what "I" means.

Trial Examiner Norwood: Is there any objection to the exhibits?

Mr. Ewing: No.

Trial Examiner Norwood: Received as marked; Commission's Exhibits 859-A through 859-E and 860-A through 860-H.

(The papers referred to, heretofore marked for identification COMMISSION'S EXHIBIT 859-A through
3971 859-E and COMMISSION'S EXHIBIT 860-A through 860-H, were received in evidence.)

Mr. DuBose: Off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Mr. Wright: By agreement of counsel, I will under-

take to get photostatic copies of these last two exhibits made and to furnish the originals to the reporter as soon as the photostats have been completed.

Trial Examiner Norwood: That may be done. Then you will have the photostats for them at our New York hearing next week. Is that what they want done?

Mr. Wright: I can probably have photostats I can put in the mail for them today.

I have no further cross-examination.

Mr. Ewing: I have no redirect.

Trial Examiner Norwood: Thank you, Mr. McCarthy.

(Witness excused.)

Trial Examiner Norwood: Call your next witness.

Mr. Ewing: Now, your Honor, our next order of business is something that we are agreed on in principle, I think but we haven't actually formulated the exact phraseology, and that is, we had proposed to offer testimony at this time with respect to certain bids made by the various respondents in response to Government business. Mr. Wright and I and others have talked about
3972 it, and he has in his possession records that are, we'll say, more authentic than some of the sources that we were going to rely on, as I understand it.

It will save a great deal of time and trouble if we can agree to have these bids go in. He wants some; we want some; we are not going to argue with each other as to what goes in and what doesn't go in, as I understand it.

Mr. Wright: Well, as I understood it, we were going to, rather than put in a mass of documents and get into something which would delay this thing by requiring a lot more evidence and testimony, agree on a statement as to contentions of each of us as to aspects of this bidding problem, which would largely dispose of the thing on a restatement of facts.

Mr. Ewing: It would be, in a sense, a statement of fact, with neither of us drawing inferences.

Mr. Wright: And with a reasonable number of specific instances set out for illustrative purposes.

Mr. Ewing: Right. Now, actually I don't know how much of a job that is, but I should think we could get together and do that this afternoon.

Mr. Wright: It is perfectly agreeable.

Trial Examiner Norwood: Will you have any further testimony?

Mr. Ewing: No further testimony. So my suggestion would be that we adjourn, and we resume—at what time would you think?

3973 Mr. Wright: Whatever time suits you. We can meet you in this room. It is probably the most satisfactory place, and we can do that.

Mr. Ewing: Yes.

Mr. Wright: May we go off the record?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Mr. Wright: I think that 3:00 o'clock will be all right.

Trial Examiner Norwood: Then we will recess now until 3:00 o'clock this afternoon.

(Whereupon, at 11:55 o'clock a.m., a recess was taken until 3:00 o'clock p.m., this day.)

3974 Afternoon Session.

Trial Examiner Norwood: The hearing reconvened at 3 o'clock, and discussion was had, and it was finally requested by counsel and approved by the Examiner that the hearing recess to reconvene in the City of New York in the Bar Association Building at 42 West 44th Street, in Room 10, at 10 o'clock a.m. on the 12th day of November 1947.

(Whereupon, at 4:05 o'clock p.m., November 7, 1947, the hearing in the above-entitled matter was adjourned, to reconvene at 10 o'clock a.m., November 12, 1947, in Room 10, Bar Association Building, 42 West 44th Street, New York, New York.)

3975 Trial Room No. 10,
Bar Association Building,
42 West 44th Street,
New York, N. Y.,
Wednesday, November 12,
1947.

Met, pursuant to adjournment, at 10:00 a.m.

Before:

John W. Norwood, Trial Examiner.

Appearances:

Joseph S. Wright, Esq., appearing for the Federal Trade Commission.

Edmund P. Wood, Esq., 2801 Carew Tower, Cincinnati, Ohio, appearing for Eagle-Picher Lead Company and Eagle-Picher Sales Company.

Robert H. Ecker, Esq., and
Henry E. Gardiner, Esq., (Chadbourne, Wallace, Parke & Whiteside, 25 Broadway, New York, N. Y.), appearing for Anaconda Copper Mining Company and International Smelting & Refining Company.

James D. Ewing, Esq., and
E. Z. DuBose, Esq., (Alexander & Green, 120 Broadway, New York, N. Y.), appearing for the National Lead Company.

J. T. Welch, Esq., (Davies, Richberg, Beebe, Busick & Richardson, 815 Fifteenth Street, Northwest, Washington, D. C.), appearing for Sherwin Williams Company.

3976 Roger Hines, Esq., (165 Broadway, New York, N. Y.), appearing for The Glidden Company.

3977 Proceedings.

Trial Examiner Norwood: The hearing will come to order.

Pursuant to adjournment in Washington on November 7th the hearing in Docket 5253 is now reconvened at 10:00 o'clock a.m. on the 12th day of November, 1947, in Room

10, Bar Association Building, 42 West 44th Street, New York, New York.

The reporter will please enter the appearance in the usual manner.

Call your first witness.

Mr. DuBose: Mr. Baum.

Trial Examiner Norwood: Yes, sir, Mr. Baum.

Mr. DuBose: Mr. Baum being recalled.

EDWARD L. BAUM was thereupon recalled as a witness for the respondents, and having been previously duly sworn testified further as follows:

Direct Examination (Continued).

Trial Examiner Norwood: Give us your full name, Mr. Baum.

The Witness: Edward L. Baum.

Trial Examiner Norwood: Mr. Baum, you have been sworn in this case?

The Witness: Yes, sir.

Trial Examiner Norwood: Take a seat.

3978 By Mr. DuBose:

Q. Mr. Baum, you testified on behalf of the respondent, National Lead, at the hearing here in New York last June 19th, I believe, and at that time you gave the following testimony at pages 3249 and 3250 of the official transcript:

"Question. Would that include shipments to the DuPont Company?

"Answer. No.

"Question. Under a contract?

"Answer. It would not include the shipments to the DuPont Company because that is an inter-branch billing proposition."

In that connection, Mr. Baum, I believe you were talking about your tabulations of white lead in oil sales by the Atlantic branch of the National Lead Company for the year 1941, is that correct?

A. Yes, sir.

Q. And in that testimony you stated that your tabulation did not include shipments to the DuPont Company because of that stated reason; is that correct

A. Yes, sir.

Q. Now, when you used the words to the effect that shipments to the DuPont Company were not included in your tabulation because that is an inter-branch billing proposition, what did you mean?

3979 A. I meant that for accounting purposes the Atlantic branch billed all transactions covering shipments to the DuPont Company as they billed them to our General Office, who in turn billed the DuPont Company. In other words—

Q. (Interposing.) In other words, if the Atlantic branch at any time billed any part, any part of a contract, for white lead in oil for the DuPont Company it would bill the Atlantic branch, which in turn would handle the billing to the DuPont Company, is that correct?

A. No; it would bill the General Office.

Q. It would bill the General Office; is that correct?

A. That is correct.

Q. Who in turn would bill the DuPont Company?

A. Who in turn would bill the DuPont Company, that is right.

Trial Examiner Norwood: Proceed.

By Mr. DuBose:

Q. Mr. Baum, you also testified that your tabulations showing sales of white lead in oil by the Atlantic branch for 1941 in the par territory have included shipments to foreign customers, is that correct?

A. Yes, sir.

Q. Now, have you in the interim at my request checked the sales records of the Atlantic branch for 1941 in an endeavor to discover the number of pounds sold by the Atlantic branch for 1941 to foreign customers?

3980 A. Yes, sir, I have.

Q. Have you those figures with you?

A. Yes, sir.

Q. Do you recall them offhand?

A. Not exactly. I didn't attempt to memorize it, but I could.

Q. Would you refresh your recollection with whatever you have with you?

A. I can do that, yes, sir.

Trial Examiner Norwood: What was the last question?

(The pending question and answer were thereupon read.)

Mr. DuBose: We are trying to show the pounds in the foreign shipments of white lead in oils by the Atlantic branch in 1941 which was included in the par territory variation.

Mr. Wright: Are you attempting to vary the terms of the exhibit?

Mr. DuBose: No. This is included. Of that total so much was shipped foreign shipment.

Trial Examiner Norwood: Very well.

Mr. DuBose: Let me ask you that because of the total you gave for foreign territory. There is a total which total included foreign shipments?

The Witness: Yes, that is correct.

By Mr. DuBose:

Q. That is the total for 1941?

Mr. Wright: Do I understand the witness is re-
3981 freshing his recollection from a document or reading from a document?

Mr. DuBose: He is refreshing his recollection from a document that he is reading.

The Witness: Shall I say something?

By Mr. DuBose:

Q. No; just refresh your recollection and give us the pounds.

Mr. Wright: I object to that, Your Honor.

Trial Examiner Norwood: If he investigated and has these figures I think he may read them off from these figures if he made them himself. Did you?

The Witness: These figures were prepared under my supervision on the I. B. M. tabulator, and this is the original run-off that was made at the conclusion of 1941 for statistical purposes.

Trial Examiner Norwood: Did you verify that? Did you check it?

The Witness: Yes, sir.

By Mr. DuBose:

Q. These are original records you say Mr. Baum?

A. This is the original tabulation as part of our regular routine of preparing reports of foreign sales, and this is the tabulation that came off the machine immediately after the close of the year 1941.

Q. When you say "this" you are referring to 3982 the record you hold in your hand?

A. This paper (indicating).

Trial Examiner Norwood: He may refer to that in giving his testimony about these figures. He is not supposed to carry those in his mind, all that column of figures. He has testified to the correctness of them.

Can you?

The Witness: I can't, sir.

By Mr. DuBose:

Q. Will you then give us the total number of pounds of foreign shipments for the Atlantic branch of white lead in oil for the year 1941?

A. The shipments of white lead in oil by the Atlantic branch in the year 1941 exported or foreign shipments I would say was 705,934 pounds.

Q. 934?

A. Yes.

Trial Examiner Norwood: Yes, 934.

By Mr. DuBose:

Q. Now, Mr. Baum, I show you a photostatic copy of Respondents' Exhibit 170-A, and opposite the word "par" in the second column from the left under the general heading "Heavy and Soft Paste White Lead," and the subheading "Total Pounds Sold," are the figures 19,652,155. Is that figure of 705,934 pounds which you have just given us as constituting the foreign shipments 3983 of white lead in oil by the Atlantic Branch for 1941 included in that figure of 19,652,155?

A. It is.

Mr. Wright: Off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: Proceed.

By Mr. DuBose:

Q. Now, will you tell us, Mr. Baum, how freight was handled on these foreign shipments in 1941 which totaled 709,934?

A. Well, the terms on all foreign shipments are f.a.s. New York.

Q. When you say "f.a.s." what do you mean?

A. Freight alongside steamer.

Q. Now, you say the terms are that. Were they that in 1941?

A. Yes, sir.

Q. And by that do you mean that the National Lead Company, Atlantic branch, would deliver foreign shipments to the pier ready to be placed aboard a ship, is that correct?

A. That is what is done, yes, sir.

Q. From there who paid the freight and other fees?

A. The customer pays from there on.

Q. Now, at the hearing on June 19th of this year you also testified that your tabulation, Respondent's Exhibit 170-A did not include shipments in containers car-
3984 rying larger than 100 pounds, is that correct?

A. Yes, sir.

Q. What shipments were made by the Atlantic branch of National Lead in 1941 in larger containers?

A. Well, we ship what is called grinders' white lead in oil to paint grinders and ink manufacturers. And my statistics, or, rather, the statistics referred to, do not include such tonnage, because it is our accounting practice to consider that as the sales for statistical purposes of another department.

Trial Examiner Norwood: What sort of a container does that go in, a car?

The Witness: They go in, usually, casks and drums larger than 100 pounds. They are not sold to the trade, and for that reason we have never included grinders' lead in oil in our white lead in oil sales.

Trial Examiner Norwood: Thank you.

By Mr. DuBose:

Q. Now, Mr. Baum, since you last testified have you at my request checked the statements of grinders' white lead by the Atlantic branch for the year 1941?

A. I have.

Q. And have you records with you that show what those shipments were?

A. I have.

Q. Where did those shipments take place as with respect to par or three-eighths territory?

3985 A. All deliveries of grinders' lead in oil where shipped to consignees located within the par zone.

Q. Within the par zone?

A. Yes.

Q. And as you have stated those purchases were paint manufacturers or other manufacturers?

A. Yes.

Q. Will you tell us from whatever records you have in your possession what the total number of pounds of grinders' white lead shipments by the Atlantic branch in the year 1941 amounted to?

A. May I refer to this memorandum I have?

Trial Examiner Norwood: Yes.

By Mr. DuBose:

Q. Will you refer to that memorandum?

A. Yes.

Trial Examiner Norwood: That is the same memorandum you had a while ago?

The Witness: No, sir, this is a different one.

Trial Examiner Norwood: Was that made in the same way?

The Witness: No, this was not made in the same way.

By Mr. DuBose:

Q. Will you tell us how that memorandum you have just referred to was made, the new memorandum?

3986 A. The new memorandum I have here was taken by further tabulation, run off from the I. B. M. sheets about the same time the export sales were made, and I copied these figures in that tabulation referred to.

Mr. Wright: At what time was that, Mr. Baum?

The Witness: At what time I took this off?

Mr. Wright: When was that made up, the record from which you took it?

The Witness: The record from which these figures were taken was made up I would say within 60 days after December 1, 1941. That is the period during which we run off a lot of annual balances, tabulations and reports for various departments which they require to show the result of the year's business.

Trial Examiner Norwood: Now, do you not think that those two documents should be marked for identification?

Mr. DuBose: Why, I would be glad to.

Mr. Wright: Off the record.

Trial Examiner Norwood: This is off the record.

(Discussion off the record.)

Trial Examiner Norwood: Go ahead.

Mr. DuBose: He can identify them in case it becomes necessary.

By Mr. DuBose:

Let me ask you one more question, Mr. Baum.

3987 The record which you have now, which you made up from other records, was that record prepared by you or under your supervision, this particular memorandum?

A. The original record was prepared under my supervision.

Q. How about this record?

A. I actually copied this from that record.

Q. And the original records are in the Atlantic branch?

A. They are there for inspection.

Q. They are there for inspection?

A. Yes.

Q. Will you now give us the total number of pounds of grinders' white lead sold by the Atlantic branch in 1941?

A. The total pounds in grinders' white lead in oil shipped during the year 1941 was 1,572,303 pounds net.

Q. What was the total of freight and cartage applicable to those shipments?

A. The total freight and cartage applicable to those shipments was $4,295.40.

Q. And mathematically what does that work out to per hundred pounds?

A. That reduces it to .2732 per hundred pounds.

Q. In other words, 27.3 cents per hundred pounds?

A. That is right.

Q. And as you have stated, I believe, all of this grinders' white lead was shipped in par territory?

3988 A. That is right.

Mr. DuBose: No further questions.

Trial Examiner Norwood: Cross-examine.

Mr. DuBose: Would you like a short recess?

Mr. Wright: I would like a recess. I would like to examine the documents from which the witness has been refreshing his recollection.

Trial Examiner Norwood: I think it is hardly time for a recess. Let us pause until you read it. We will recess in about thirty minutes.

(After a brief interval.)

Trial Examiner Norwood: Proceed.

Cross-Examination by Mr. Wright.

Q. Mr. Baum, you spoke of the DuPont shipments being billed through the Central Office. Were there any other similar contractual relationships whereby the Atlantic branch supplies white lead in oil under private label?

A. Not to my recollection in the year 1941, during the year 1941.

Q. So that there would be no similar situation such as that?

A. No. I feel quite sure there were not.

Q. Included in this thing?

A. My answer would be no.

Q. Now, the grinders' white lead in oil, what was
3989 that product exactly? Is that white lead in oil of similar consistency and quality as white lead in oil which is sold under Dutch Boy label?

A. It is, I would say, similar in all respects except that it contains a great deal more linseed oil.

Q. Well, is it thinner in consistency? In other words, does it contain more oil than the soft paste?

A. Yes, sir, containing more vehicle, that is, linseed oil, it becomes thinner in consistency.

Q. How is that product sold as far as territorial differentials? Does that take the same territorial differentials as the white lead in oil in their smaller kegs?

A. I don't believe I can testify as to price differentials. I am not in the sales department.

Q. Do you know?

A. I don't know positively.

Q. Now, this figure of grinders' lead in oil of 1,572,303 pounds shipments, to how many customers does that represent in America?

A. That represents shipments by the Atlantic branch to four different customers.

Q. What was the average price of that product?

A. The average price was $7.92 per hundredweight.

Q. Where were those customers located?

A. The customers were all located in what is
3990 termed "par" territory; in New York City, Jersey City, and Providence, Rhode Island.

Mr. Wright: No further examination.

Mr. DuBose: No further examination.

Trial Examiner Norwood: Thank you, Mr. Baum.
(Witness excused.)
Trial Examiner Norwood: Call your next witness.
Mr. DuBose: Mr. Tibbets.

ALBERT B. TIBBETS was thereupon recalled as a witness for the respondents, and having been previously duly sworn, testified further as follows:

Direct Examination (Continued.)

Trial Examiner Norwood: Mr. Tibbets, you have been sworn in this case heretofore?
The Witness: Yes, sir.
Trial Examiner Norwood: Give your name and address.
The Witness: Albert B. Tibbets, National Lead Company, 111 Broadway, New York.
Trial Examiner Norwood: Proceed.

By Mr. DuBose:

Q. Mr. Tibbets, I believe you testified in Washington on June 10th of this year?
A. Yes, sir.
Q. And at that time, as the record shows, through 3991 you were introduced in evidence Respondents' Exhibits 150-A and B, 151-A and B, and 152, upon the condition that the underlying data be furnished to the Commission or to its counsel; 150-A and B being, as you then identified them, a report gotten up in 1943 by the Home Office, showing the sales of white lead in oil by branches by States and giving a tonnage of each branch per State. Since that time have you communicated with the branches of the National Lead Company, other than the Pacific Coast branch, and obtained a report from them respecting these figures which were originally obtained in 1943?
A. Yes, sir.
Mr. DuBose: I ask that these records be marked.
Trial Examiner Norwood: Begin with Respondents' Exhibit 212.
Mr. DuBose: Respondents' Exhibit 212-A and sub-letters respectively for identification.

(The papers referred to were marked Respondents' Exhibits 212-A, 212-B, 212-C, 212-D, 212-E, 212-F, 212-G, 212-H, 212-I, 212-J, 212-K, 212-L, 212-M, 212-N, 212-O, 212-P, 212-Q, 212-R, 212-S, 212-T, 212-U, 212-V, 212-W, 212-X, 212-Y, 212-Z, 212-Z-1, and 212-Z-2, for identification.)

Trial Examiner Norwood: What have you marked?

(Discussion off the record.)

Trial Examiner Norwood: Proceed.

3992 Mr. DuBose: Pursuant to agreement with counsel for the Commission at this time, in lieu of testimony on the subject, I will make the statement that Mr. Tibbets since last testifying wrote to the branches which checked their records, the branches, and sent back here the original report which they checked with their records, or rechecked their records, and made a new report on the white lead tonnage sold by each branch, excluding the Pacific Coast, each branch shown on Respondents' Exhibit 150-A and B, and in all respects the figures coincided with a new check, with the exception of the Boston branch, which on a recheck of our 1942 sales records discovered that the figures appearing on Respondents' Exhibit 150-A should read for Maine 204 tons, for New Hampshire 105 tons, Massachusetts 1613 tons, instead of the figures there indicated.

When I said "there" I am referring to Respondents' Exhibit 150-A.

And I should also like to make the statement that the underlying records are in the possession of the branches and are available for inspection by the Commission at any time.

Mr. Wright: I am willing to agree with counsel's statement that Mr. Tibbets, if called, would have testified that he had such checks made of the branch records, and

that with the variations which have been pointed
3993 out the figures in Respondents' Exhibit 150-A and B were correct from their records.

Trial Examiner Norwood: Very well.

By Mr. DuBose:

Q. Mr. Tibbets, at the hearings in June in Washington when you identified Respondents' Exhibit 153, which was introduced in evidence, you stated that these figures were in the Home Office books.

I show you a copy of Respondents' Exhibit 153, and

I ask you whether since that time, at my request, you have checked the actual record which contained those figures?

A. Yes, sir.

Q. Will you tell us what that record is?

A. It is a loose-leaf holder with the years showing the tonnage figures from each branch.

Q. And where is that record physically located?

A. In the accounting department in the General Office.

Q. At 111 Broadway, New York?

A. At 111 Broadway, New York.

Q. And is that book available for inspection?

A. Yes, sir.

Q. By the Commission or its counsel at any time?

A. Yes, sir.

Trial Examiner Norwood: Let me see that.

(Document handed to the Trial Examiner.)

3994 Trial Examiner Norwood: Thank you.

By Mr. DuBose:

Q. Now, Mr. Tibbets, I show you Respondents' Exhibit 154-A to 154-I for identification, which you started to identify last June in Washington, and do you recognize that document as the one that you testified to about in the June hearings?

A. Yes, sir.

Q. Now, since the hearing last June have you rechecked all of the figures and dates shown on Respondents' Exhibit 154-A to 154-I for identification?

A. Yes, sir.

Q. And did you find some errors?

A. Yes, sir.

Q. Will you give us whatever corrections you wish to have noted on this exhibit?

Trial Examiner Norwood: What exhibit is that now?

Mr. DuBose: 154-A to 154-I for identification.

The Witness: On page 7.

Mr. DuBose: When you say "7" you are referring to Respondents' Exhibit 154-G for identification?

The Witness: Yes, sir.

Mr. DuBose: All right, sir.

The Witness: The paste red lead price should be $12 instead of $14.

Mr. DuBose: All right. Will you continue?

3995 The Witness: On page 8—wait a minute. Yes, page 8.

By Mr. DuBose:

Q. When you say, "page 8," you are referring to 154-H for identification?

A. Yes, sir.

Q. All right, sir.

A. The paste red lead price for January 1 and March 1, 1937, should be struck out. There were no retail prices issued for those two dates.

Q. All right. Is there any other on that same page?

A. And the date of paste red lead price should be September 15 instead of September 13, 1937.

Q. Do you mean the paste red lead price of $13.75 which appears opposite September 13th actually went into effect September 13th?

A. That is right.

Q. Are there any other corrections?

A. Not to my knowledge.

Q. Now, Mr. Tibbets, have you with you all of the underlying data which show all of the prices reflected on this Exhibit 154-A to 154-I for identification?

A. Yes, sir.

Q. And will you produce those?

A. There is one of them, pig lead prices, and 3996 white lead, and oxide price cards.

Q. Now, Mr. Tibbets, I show you Respondents' Exhibit 154-A to 154-I for identification, and ask you whether you can tell us what the pig lead prices that appear thereon are?

A. Common.

Q. Common pig lead prices?

A. Common pig lead prices.

Q. And from what source did you obtain these?

A. From a record in the Atlantic branch that was kept of every change of pig lead prices.

Q. Now, I ask you to look at the paste white lead prices and I now ask you to tell us what those prices were.

A. That was list prices or resale prices.

Q. And how about paste red lead?

A. That is the same per hundred pounds.

Q. Per hundred pounds?

A. Per hundred pound keg.

Q. Now, on all the others, namely, dry white lead, lead sulphate, dry red lead and litharge, will you tell us what those prices are, or for what quantities those prices are?

A. Per hundred on a barrel price basis.

Q. And a barrel is either five or six hundred pounds?

A. Around five or six hundred pounds.

Mr. Wright: No further questions.

Trial Examiner Norwood: Off the record a minute.

3997 (Discussion off the record.)

Mr. DuBose: I would like to state this on the record: That I am deferring offering Respondents' Exhibit 154-A to 154-I, inclusive, for identification, subject to Mr. Wright's preliminary cross-examination.

Trial Examiner Norwood: We will take a 5-minute recess.

(Thereupon a short recess was taken.)

Cross-Examination (Continued)

By Mr. Wright:

Q. Mr. Tibbets, do you know where the Atlantic branch got the figures purported to be shown in these documents here?

A. Yes.

Q. On pig lead prices?

A. Yes, the Metal Purchasing Department.

Q. In other words, they were supplied to them by another division of the National Lead Company?

A. Yes, sir.

Q. Do you know where the Metal Purchasing Department got it?

A. Yes. They would get a phone call from either A. S. & R. on St. Joe Lead as to the price change, and then they would send out notices to branches of the price changes in pig lead.

Q. Now, you say they would do that. Do you know that?

A. They do.

3998 Q. Do you know of your own knowledge that that is the source of the information contained in this list?

A. Yes, sir, to the best of my knowledge, yes.

Q. Now, just what is your knowledge?

A. Well, they keep the same record in their office,

which is open to your examination, showing the same information.

Q. Did you check the figures back of this list that was in the Atlantic branch?

A. No, sir.

Q. Now, getting to these price cards on various products here, these are all quotations of the Atlantic branch, are they?

A. Well, I don't recall. I know they are all par price lists. There may be other branches in there. I was interested in getting the par prices.

Q. Where did you get these cards?

A. I got them mostly from the office or files of Harold Rowe.

Q. Do you know that is a complete set of all price changes that are covered in that period of time?

A. Yes, sir.

Q. How could you check them?

A. I checked them against the list and against the list I have there on the exhibit.

Q. Well, what I am getting at is how could you 3999 check these cards as being all that there were, the complete set?

A. That hasn't every price change that was kept there. They kept them all from 1921 on.

Q. Do these cards show a succession from one year list to another?

A. Yes, sir.

Q. On the face of them?

A. That is right.

Mr. Wright: I have no further preliminary cross.

Mr. DuBose: I at this time should like to offer in evidence Respondents' Exhibit 154-A to 154-I for identification.

Mr. Wright: I have no objection.

Trial Examiner Norwood: I will ask you to indicate on there the corrections which this witness has made in the testimony just given. It may be entered with a pen, or in any way.

Redirect Examination by Mr. DuBose.

Q. Mr. Tibbets, will you use your pen and make those corrections which you spoke of, and then we can go off the record?

Trial Examiner Norwood: Yes; off the record.

(Discussion off the record.)

Trial Examiner Norwood: The exhibit is received in evidence.

4000 (The papers referred to, heretofore marked for identification RESPONDENTS' EXHIBIT 154-A, 154-B, 154-C, 154-D, 154-E, 154-F, 154-G, 154-H, and 154-I, were received in evidence.)

Mr. Wright: Off the record.

(Discussion off the record.)

Mr. DuBose: No further direct examination.

Cross-Examination (Continued) by Mr. Wright.

Q. Going back to Respondents' Exhibit 153, do you know what classes of business in white lead paste are included in the figures which appear on that exhibit?

A. Well, you mean whether it is trade or Government business, and so forth, included in those?

Q. Yes.

A. The total white lead business done by our branch of paste lead I couldn't tell you.

Q. Would that include shipments?

A. I couldn't tell you; I can't answer exactly what is included in those figures.

Q. Would the Atlantic Branch, for instance, include your shipments to DuPont under your contractual relationship with that company?

A. No, they wouldn't go in there; I am sure of that.

Q. Did you check this to know exactly what did go in?

4001 A. No, but those are figures on trade sales.

Q. Those are trade sales?

A. I would say this: that having had that done by the Accounting Department and out of our records which I saw I am not in a position to tell you exactly what is in those figures.

Q. You would not know what the figures from branches are in there?

A. I couldn't tell you that.

Q. Or whether grinders' white lead would be in there?

A. There wouldn't be. I can tell you that definitely.

Q. Do you know grinders' lead is not in there?

A. I know that, yes.

Mr. Wright: Thank you, Mr. Tibbets.

Redirect Examination (Continued) by Mr. DuBose.

Q. You said according to your best knowledge this included trade sales; is that correct?

A. Trade sales, yes.

Q. That would include ordinary purchases of white lead in oil either for resale or for use by painters and others; is that correct?

A. That is right.

Mr. DuBose: No further questions.

4002 *Recross Examination by Mr. Wright.*

Q. The fact remains, however, Mr. Tibbets, that you do not know of your knowledge exactly what is in those figures?

A. Having made a careful check of that, no, I don't believe I could say so.

Mr. Wright: Nothing further.

Redirect Examination (Continued) by Mr. DuBose.

Q. Let me ask you whether the book from which this material was obtained relates to branch percentages of Company white lead paste sales?

A. That is right.

Mr. DuBose: All right; that is all.

Trial Examiner Norwood: Thank you, Mr. Tibbets.

(Witness excused.)

Trial Examiner Norwood: Call your next witness.

Mr. DuBose: I was just going to give these (indicating documents) back to him.

By agreement of counsel the exhibits which heretofore were marked Respondents' Exhibit 212-A to Z-2 for identification shall deemed withdrawn and the number may be used again in another exhibit.

Trial Examiner Norwood: Wait a minute. I do not think there is any necessity for that. There is already testimony in the record about it, and the reporter is bound
4003 under his contract to list that number so that you can turn back and see just what happened.

Mr. DuBose: All right, sir.

Trial Examiner Norwood: With respect to the exhibits that were numbered that way.

Mr. DuBose: May I say this, then: they are still in our custody?

Trial Examiner Norwood: They are still in your custody, yes.

Mr. DuBose: They are still in our custody, and there was no necessity we found for offering them because of the agreement that counsel for the Commission made with me.

Trial Examiner Norwood: Yes, that is all clear, but the record will stand to show just what happened with respect to that number.

Call your next witness.

Mr. DuBose: Mr. Higgins.

J. R. HIGGINS was thereupon recalled as a witness for the respondents, and having been previously duly sworn, testified further as follows:

Direct Examination.

Trial Examiner Norwood: State your full name and address, Mr. Higgins.

The Witness: J. R. Higgins, St. Louis, Missouri.

4004 Trial Examiner Norwood: Mr. Higgins has been sworn. You may take the stand.

Proceed.

Mr. DuBose: I ask that these documents be marked Respondents' Exhibit 213-A and succeeding letters for identification.

(The papers referred to were marked Respondents' Exhibit 213-A, 213-B, 213-C, 213-D, 213-E, 213-F, 213-G, 213-H, 213-I, 213-J, 213-K, 213-L, 213-M, 213-N, 213-O, 213-P, and 213-Q, for identification.)

By Mr. DuBose:

Q. Mr. Higgins, do you recall in Washington last June 12th identifying the documents which have been marked Respondents' Exhibit 160-A through Respondents' Exhibit 160-R for identification, which are listed in the index to the minutes for June 12th, and which constituted a study made under your direction of sales by the St. Louis branch of the National Lead Company for the year 1941 covering white lead in oil, or heavy and soft paste white lead, dry white lead, oxides in car lots and oxides in less than car

lots? Have you since those hearings rechecked all of the figures and rates and so on shown with respect to heavy and soft paste white lead sales by the St. Louis branch of the National Lead Company for 1941?

A. We have rechecked all our records.

4005 Q. And did you have a complete new set of corrected figures typed up in your office at St. Louis?

A. That is correct.

Q. I show you Respondents' Exhibit 213-A through Q for identification, and I will ask you whether those are the corrected figures and rates for white lead in oil sales by the St. Louis branch of the National Lead Company for the year 1941?

A. Those are the corrected figures.

Q. Now, you explained in some detail at the last hearing on June 12th how these figures were arrived at, is that correct?

A. Yes, on the original testimony that is correct.

Q. On the original proposed exhibit?

A. That is right.

Q. Were these figures and rates in Respondents' Exhibit 213-A to Q for identification similarly prepared as the former exhibit? Were they prepared in the same fashion?

A. They were prepared in the same fashion, but a careful check was made to avoid any errors that may have appeared as the result of an effort on our part to consolidate into eight days the billings for different commodities covering the tonnage freight rate and all the details. That took ten or twelve employees eight days to prepare.

Q. Now, let me ask you this, Mr. Higgins: For the most part of it the figures are the same as those appearing

4006 in Respondents' Exhibit 160-A through R, inclusive, for identification, for the most part?

A. That is correct.

Q. But you did make corrections. What did those corrections generally consist of?

A. The classification of freight rates that were applicable to the shipment, either from St. Louis or from our warehouse points and where the combination of rates were involved.

Q. How about cartage figures? Were they carefully checked?

A. The cartage figures are actual figures which we found were in our Auditing Department, and we made an attempt on our original sheet to fix the estimate of the

drayage, and then the actual drayage which came afterwards. There was some confusion in arriving at those figures, although the end figure was identically the same.

Q. And in this new compilation, the Respondents' Exhibit 213-A to Q for identification, wherever you show cartage those are actual cartage figures?

A. That is correct.

Q. And wherever you show rail rates you have in each instance made an honest endeavor to discover the exact applicable rate which would be applicable to these particular towns and to particular pounds there sold, is that correct?

A. That is correct.

Q. And if I were to ask you as to the method by
4007 which the figures which appear on Respondents' Exhibit 213-B through Q, inclusive, for identification, would your answer be along the same lines as the answers you gave me on June 12th with respect to the white lead in oil figures which appear on Respondents' Exhibit 160-D through R, inclusive, for identification?

A. That is correct.

Mr. Wright: An objection, Your Honor. Read the question.

Trial Examiner Norwood: Read the question.

(The pending question was thereupon read by the reporter.)

Mr. Wright: That is a highly improper question, Your Honor.

Mr. DuBose: Your Honor, I could take him through—

Trial Examiner Norwood (interposing): Well, it is just to permit him to adopt that previous testimony; that is, to state that these documents were gotten up in the same way and are based on the same data except for these corrections.

Mr. DuBose: I have already asked him the question. He has replied.

Trial Examiner Norwood: Yes.

Mr. DuBose: For the most part these are the same figures, and the new compilation is just a correction in the old compilation.

4008 Trial Examiner Norwood: Yes. I will overrule the objection.

Mr. Wright: As I understand it the question is not a question as to what the witness has testified, but was a

question as to what the witness would answer if you asked him, if counsel asked him a question.

Mr. DuBose: I do not see the difference.

Mr. Wright: I see it.

Trial Examiner Norwood: I think that question is clarified. Go ahead.

By Mr. DuBose:

Q. What is your answer, sir?

A. That is correct.

Q. In other words, Respondents' Exhibit 213-B through Q for identification and all the facts and figures appearing thereon were prepared from the same sources and in a similar fashion as were the facts and figures which were on Respondents' Exhibit 160-D to R for identification?

A. That is correct.

Q. And I show you Respondents' Exhibit 213-A for identification and ask you what that purports to be?

A. This report is the 1941 sales of white lead in oil classified under the various zones, total pounds sold under each zone, total freight and cartage for each zone and the final figures, the average freight per hundredweight of each zone.

4009 Q. And those figures which appear on 213-A are a summary of the corrected figures which appear on Respondents' Exhibit 213-B through Q for identification?

A. That is correct.

Q. And to the extent that they represent corrected figures they differ slightly, or to some degree, with the summary you have heretofore identified, which appears on Respondents' Exhibit 164 for identification?

A. That is correct.

Mr. DuBose: I offer in evidence Respondents' Exhibit 213-A to Q, inclusive, for identification.

Mr. Wright: May I ask whether there are to be similar documents similarly related to the other exhibits offered?

Mr. DuBose: This is a similar document to those other exhibits.

Off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: Are you ready to go ahead?

Mr. Wright: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: Back on the record.

Make your statement, Mr. Wright.

Mr. Wright: I would like to request an opportunity of examining these exhibits and the other data which
4010 were previously identified, and to defer preliminary cross-examination on identification of this exhibit until some time tomorrow.

Trial Examiner Norwood: Yes.

Mr. DuBose: That is agreeable with us.

Trial Examiner Norwood: I will defer the ruling until tomorrow, and this witness will come back tomorrow at any time the counsel may require.

Mr. DuBose: I will have some further questions.

Trial Examiner Norwood: And for some further questioning about it.

Have you another witness you can put on?

Mr. DuBose: I have some more questions of this witness.

Trial Examiner Norwood: All right. Go ahead. And that is 213 that is pending.

Mr. DuBose: That is right. I ask that this document be marked Respondents' Exhibit 214 for identification.

(The paper referred to was marked Respondents' Exhibit No. 214 for identification.)

Mr. DuBose: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: Back on the record.

By Mr. DuBose:

Q. Mr. Higgins, I show you Respondents' Exhibit 162-A, B, C, and D, for identification, which you iden-
4011 tified last June 12th in Washington as representing the figures showing dry white lead sales by the St. Louis branch of the National Lead Company for the year 1941 in par and in one-cent territories, and I call your attention particularly to Respondents' Exhibit 162-C for identification, and I ask you whether there have been any corrections made on this document since it was identified on June 12th?

A. Yes.

Q. Now, on 162-C is the figure 1,357,409; is that the corrected total plus cartage figure?

A. That is the corrected figure.

Q. In other words, that is the estimated freight plus the cartage corrected figure?

A. That is correct.

Q. And I ask you whether the next column, under the heading "Less St. Louis, New Orleans, Kansas City, Dallas, Omaha, and St. Paul," whether those figures have been added since this document was identified?

A. That is the correction of the—

Q. (Interposing.) Those have been added? That is all I am asking you.

A. Those have been added.

Q. And I ask you whether or not you and I, working together, did not add the last entry on that page, "Less Kansas City," and so forth?

4012 A. That is correct.

Q. Now, Mr. Higgins, you identified, I believe Respondents' Exhibit 162-A to C, inclusive, as being the dry white lead sales by St. Louis for par territory in 1941, is that correct?

A. That is correct.

Q. And in some instances cartage figures appear of 10 cents a hundred opposite those entries?

A. That is correct.

Q. And I believe you stated that those were at that time estimated cartage per hundredweight?

A. That is correct.

Q. Now, you had formerly had on this sheet cartage for the six points, St. Louis, Kansas City, New Orleans, Dallas, Omaha, and St. Paul, is that correct?

A. That is correct.

Q. And those are actual cartage figures as corrected?

A. That is correct.

Q. Did you find upon recheck that some of the estimated 10-cents per hundredweight cartage figures would be applicable to those six towns? Do you get what I mean? I mean when you rechecked it.

A. Yes, that is correct.

Q. Did you not find that some of the estimated 10-cent cartage were for the various cities for which you added cartage at the end?

4013 A. That is correct.

Q. Then your correction under the heading "Less St. Louis, New Orleans, Kansas City, Dallas, Omaha, and St. Paul," which you have explained that you added were a subtraction of the estimated 10 cents per hundredweight that you had in the body of these sheets, is that correct?

A. That is correct.

Q. And those corrections carried through in every in-

stance except for the shipments to Kansas City, from Kansas City, which carried a cartage of 10 cents, and of which the poundage was 53,400, is that correct?

A. That is correct.

Q. And on checking yesterday with me did you and I discover that error?

A. We did.

Q. And did you see me make the final correction in my handwriting, a correction, "Less Kansas City, 53,400 times 10"?

A. That is correct.

Q. Now, the final figure on that page, Respondents' Exhibit 162-C, which you said you saw me make in my handwriting, is the corrected total freight and cartage for dry white lead, St. Louis branch, 1941, sales in par territory, is that correct?

A. That is correct.

Q. That corrected figure appears in the summary, which is Respondents' Exhibit 214 for identification, is that correct?

4014 A. That is correct.

Q. I show you Respondents' Exhibit 162-D for identification, which you identified as dry white lead sales in the one-quarter territory?

A. That is correct.

Q. And I ask you whether or not any corrections have been made on that?

A. There are no changes there.

Q. Now, Respondents' Exhibit 214 for identification purports to show what?

A. This purports to show 1941 sales of dry white lead.

Q. By the St. Louis branch of National Lead Company, is that correct?

A. St. Louis branch of National Lead Company, that is correct.

Q. And is that paper a summary of the final figures reached and as corrected which appear on Respondents' Exhibit 162-A through D for identification?

A. That is correct.

Mr. DuBose: At this time I should like to offer in evidence Respondents' Exhibit 162-A to D, inclusive, for identification, and Respondents' Exhibit 214 for identification, which has been identified by the summary of those exhibits heretofore identified.

Mr. Wright: Will you tender the witness for 4015 preliminary cross-examination on the identification?

Mr. DuBose: Yes.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: Proceed with your cross-examination.

Mr. Wright: Your Honor, I would like to have the same privilege of examining these documents, as you can tell there is considerable complexity to them, and I have never seen these corrections which have been made on the exhibits since they were first identified.

Trial Examiner Norwood: Counsel may have until tomorrow to examine them, the same as in the case of the other exhibits. I will defer the ruling.

Mr. DuBose: May we go off the record for a moment?

Trial Examiner Norwood: Yes.

(Discussion off the record.)

Trial Examiner Norwood: Back on the record.

Mr. DuBose: Could we go on the record while I make a motion for an adjournment until tomorrow morning?

At this time, Your Honor, I should like to move for an adjournment of these hearings until 10:00 a.m. tomorrow morning at the same place.

Trial Examiner Norwood: Is that agreeable to counsel for the Commission?

4016 Mr. Wright: That is agreeable to me, sir.

Trial Examiner Norwood: Now, as I understand from our off-the-record discussion, this is necessary to allow the Commission's counsel to examine these exhibits, and it is impracticable for respondents to produce any more witnesses today. But I want to ask them then to let us run continuously after I re-convene tomorrow morning, so that we may get through this week.

We are under a great necessity for saving all the time possible. I will ask counsel to co-operate.

We will meet in this room tomorrow morning.

Mr. DuBose: Yes, sir.

Trial Examiner Norwood: Do you want to meet any earlier than 10:00?

Mr. DuBose: I do not think that is practical either, Your Honor.

Trial Examiner Norwood: We will recess until 10:00 o'clock tomorrow morning in this same room.

(Whereupon, at 12:00 o'clock noon, November 12, 1947, the hearing in the above-entitled matter was adjourned until tomorrow, November 13, 1947, at 10:00 o'clock a.m. at the same place.)

4017 Trial Room No. 10,
Bar Association Building,
42 West 44th Street,
New York, N. Y.,
Thursday, November 13, 1947.

Met, pursuant to adjournment, at 10:00 a.m.

Before:

John W. Norwood, Trial Examiner.

Appearances:

Joseph S. Wright, Esq., appearing for the Federal Trade Commission.

Edmund P. Wood, Esq., 2801 Carew Tower, Cincinnati, Ohio, appearing for Eagle-Picher Lead Company and Eagle-Picher Sales Company.

Robert H. Ecker, Esq., and
Henry E. Gardiner, Esq., (Chadbourne, Wallace, Parke & Whiteside, 25 Broadway, New York, N. Y.) appearing for Anaconda Copper Mining Company and International Smelting & Refining Company.

James D. Ewing, Esq., and
E. Z. DuBose, Esq., (Alexander & Green, 120 Broadway, New York, N. Y.), appearing for the National Lead Company.

J. T. Welch, Esq., (Davies, Richberg, Beebe, Busick & Richardson, 815 Fifteenth Street, Northwest, Washington, D. C.), appearing for Sherwin-Williams Company.

4018 Roger Hinds, Esq., (165 Broadway, New York, N. Y.), appearing for The Glidden Company.

P. J. McDowell, Esq., Midland Building, Cleveland, Ohio, appearing for Sherwin Williams Company.

4019 PROCEEDINGS.

Trial Examiner Norwood: The hearing will come to order. Pursuant to adjournment yesterday the hearing in Docket No. 5253 is now reconvened at 10:00 o'clock a. m. on the 13th day of November, 1947, in Room 10, Bar Association Building, 42 West 44th Street, New York, New York.

The reporter will please enter the appearances.
Call your first witness.
Mr. Wright: Mr. Higgins.

J. R. HIGGINS was thereupon recalled as a witness for the respondents and, having been previously duly sworn, testified further as follows:

Trial Examiner Norwood: Will Mr. DuBose ask the questions?
Mr. Wright: No, I will.

Cross-Examination (Continued) by Mr. Wright.

Q. Now, Mr. Higgins, when you testified first, you testified that according to these documents which have been identified as Respondents' Exhibits 162-A and sub numbers, 213-A and sub numbers, 214 and 162-A to D, are all revisions and further boiling down of the information in the first exhibit?

A. Yes, the corrections and errors which were apparent to us in going over the picture.

4020 Q. What was the purpose of making these exhibits up, Mr. Higgins?

A. The new—

Q. The original and the new ones?

A. The purpose was in response to a letter which we had received from our New York office to make up certain figures covering tonnage, cost of freight and cartage and the end figure, which as I recall, was the cost per hundred weight. That briefly was the outline, and which was the final figure which we worked to.

Q. Now, we had extensive cross-examination about various factors and figures that went into these things when you were here in New York the last time. Have you remembered or read that transcript since the time, and are you familiar with the examination then?

A. Yes, sir.

Q. Are the methods and the techniques employed on the new material 213 and sub numbers and 214 the same as the methods which you testified about on your direct and cross-examination?

A. They were identically the same.

Q. Identically the same?

A. Yes.

Q. So if I asked you the same questions on cross-examination about the new material 213 and 214 your answers would be the same?

4021 A. That is correct.

Q. Now, I call your attention to 163-A to D, 163-A to H, 163-G which are pending on an offer in evidence relating to the objections I made: I notice that none of this new material contains anything about objections I had—

Mr. DuBose: Just a moment, I don't recall that there is an offer pending.

Mr. Wright: I beg pardon, I think it has been offered and re-offered.

Mr. Ewing: At this point I will withdraw the offer of those particular exhibits.

Trial Examiner Norwood: Off the record, just a minute.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. DuBose: Counsel for the Commission has called attention to the fact that at the hearings last June in Washington, and again in the subsequent week of June 18, I believe in New York, counsel for the respondent National Lead offered and re-offered through the witness on the stand the following exhibits then marked for identification, namely, Respondents' Exhibit 160-A through R, inclusive, 161, 162-A through D, 163-A through G and 164. At this time we should like to withdraw our offer of those exhibits to the following extent: We withdraw our offer as to Respondent's Exhibit 160-A through R, inclusive, 161,

4022 162-A through D, 163-A through G, and 164. At this time we should like to withdraw our offer of those exhibits to the following extent: We withdraw our offer as to Respondent's Exhibits 160-A through R, inclusive, 161, 163-A through G, inclusive, and 164, and our offer now with respect to this freight and tonnage information is restricted to our offer made yesterday, namely, Respondent's Exhibit 213-A through Q for identification, Respondent's Exhibit 214 for identification and Respondent's Exhibit 162-A through D with the corrections to Respondent's Exhibit 162-C which were made since the document was originally identified and about which Mr. Higgins testified yesterday.

Trial Examiner Norwood: The counsel may withdraw them.

By Mr. Wright:

Q. As I understand it, Mr. Higgins, you went back over all of the material that was originally identified since the last hearing; is that correct?

A. I made a very very careful study of the white lead in oil because we found in going through the records that there were errors that were apparent. As I explained yesterday, the first job was done in about eight days' time, ten or twelve people, and involved a year's work.

Q. Did you go over the objection I had to the situation as it showed in there?

4023 A. Nothing more than what covered in the testimony that was sent to me. I didn't go over anything further.

Q. You didn't further check the objection I had to the time of what the situation was?

A. No, sir, I have not made any further check.

Q. Since this last hearing in New York?

A. That's right.

Q. I take it, that the purpose of this 213-A through Q is to show the average freight per hundred weight in zones, to show that their differentials are justified from your point of view, is that not correct?

A. Yes, sir, that is correct.

Q. Now, I call your attention to some matters which appear on this exhibit, 213, Q in the par zone now on white lead in oil, State of Illinois. You show us to Quincy two rates, a truckload of twenty-five cents and less than carload, thirty-five cents?

A. Right.

Q. And your extension on that tonnage, on that poundage of 66,130 is thirty cents a ton?

A. That is correct.

Q. Which is an average between the truckload and less than carload?

A. That is correct.

Q. You do the same in Springfield, you split the

4024 difference between the truck load rate of twenty-seven cents and L. C. L. rate of thirty-one cents and expend it to twenty-seven cents a hundred on 94,000 pounds roughly?

A. Yes.

Q. When you get over on Exhibit 213-D, there is a rate of fifty-three cents which appears to be less than car load rate; is that correct?

A. That is correct.

Q. Yet there was a quantity involved there of 87,121 and ½ pounds. I call your attention to Waterloo on the same exhibit which carries a rate of sixty-three cents which is apparently the less than car load rate?

A. That is correct.

Q. The amount offered is 87,004 and ½ pounds. I call your attention to the fact that in Duluth on Exhibit 213-E you show first a thirty-four cent rate in the St. Paul warehouse and then a forty-cent less than car load rate giving you a total extension then of eighty-seven cents employed in 112,363 pounds. I call your attention to the fact that on 213-H you carry a similar extension of a rate for St. Joseph taking the car load to Kansas City, twenty-nine cents a hundred, less than car load rate from Kansas City to St. Joseph of twenty-five cents or a total extension of fifty-four cents a hundred and that the pounds involved were 82,347 and ½?

A. Yes.

4025 Q. I call your attention to the fact that on 213-L you show, apparently, a less than car load rate from St. Louis to Jackson, Mississippi of eighty-nine cents where there is 63,200 pounds involved?

A. Yes.

Q. Will you explain to me why these par zone shipments, Mr. Higgins, where we have quantities from 66 to 100 thousand pounds involved that you figure that they were shipped on an average between the truck load or car load rate and the less than car load rate, yet when you get into the premium zones in similar quantities you figure it all at the less than car load rate?

Mr. DuBose: Well, I object to that question upon the ground that it does not correctly summarize the figures with respect to the par zone.

Mr. Wright: I will amend the question then to make it on the basis of the figures which I have just called Mr. Higgins's attention to, then.

A. When these figures were prepared, when the tonnages for the towns were prepared, it was not less to one individual. I had two people come in to my office and we sat down and we collectively went over and discussed the various shipments; how they were handled. The corrections that were made are errors that were apparent, possibly an oversight, but in the case of the par zone you speak of

4026 here in Quincy and Springfield, Peoria, we took an average of the rates because we found it was necessary at that time to make less than car load shipments. And in order to arrive at an accurate figure we took the average in those points as near as we could determine the cost of the freight in getting the shipments from St. Louis to those points in the par territory.

Q. Why do you assume there were never any truck loads or car loads shipments involving 1,000 pounds. For instance, from Duluth to St. Paul it was 82,000 pounds, from Kansas City to St. Joe, when you do assume an equal rate between truck loads and less than car loads in places like Quincy and Duluth on smaller quantities?

A. As far as the warehouses are concerned, we make every effort from our own plant to our own warehouse—

Q. Exactly.

A. To the warehouse points, then the local shipments are made from there.

Q. What was the basis of your determining that on that 56,000 pounds to Quincy that half of that went by truck load and that as to the 112,000 pounds to Duluth none of it went by truck load or car load?

A. In the case of Duluth, we accomplished the point by shipping from the warehouse. If we had shipped from St. Louis to Duluth the freight rate would have been much higher.

Q. I am talking about the truck loads which show 4027 shipments of 112,000 pounds from St. Paul to Duluth. How can you assume none of that went by truck load?

A. It may have been—you are speaking of Duluth?

Q. Yes, sir.

A. There was not enough at that time to make shipments directly from St. Louis, either truck loads or so it was shipped out of St. Paul as the material was available.

Q. Weren't the warehouses in your St. Paul territory served by truck to Duluth rather than less than truck loads or less than car loads when it was possible to do so?

A. When the tonnage was much less than that, that would be absolutely correct.

Q. We are talking about 1941. We are talking about a city you shipped 112,000. In that case you say it went less than car loads. In another case in a town which only took

56,000 pounds you say that went half by truck and the other half less than car loads. How do you make that distinction between those particular cities?

A. We know pretty well in the case of our accounts in Peoria who would take truck loads and who would take L. C. L. shipments and we could determine from our shipments those who handle the shipments. I think that is an absolute correct record. This is the best job the combined efforts of all of our people could do in arriving at this.

4028 Q. Since all of the material for St. Joe and all of the material for Duluth, apparently went out of the Kansas City and St. Paul warehouses, respectively, you would not have records as to that in your central office, would you?

A. We would have the tariffs for 1941.

Q. I am talking now about the records from which you know what went in truck loads, what went in less than truck loads and what went L. C. L.?

A. I would say that there is no one could go back into 1941 with a 100 per cent memory of every shipment, but I will state that to the best of my memory our shipments went the way they are listed, those shipments were handled that way.

Q. That is what I am getting at.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Mr. DuBose: I have just one or two questions here. We re-offer the same exhibits, namely, 213-A through Q, inclusive, for identification, 214 and 162-A to D as corrected.

Mr. Wright: Well, Your Honor, I object to the receipt of this in evidence. I think it is apparent by now the long time we have spent on direct and on cross, both at this hearing and the previous hearings in New York and Washington just what this information is, and I think it has become apparent in those two hearings how unreliable such information can be. It is obvious on the state of the record now how unreliable it can be. I can't question the

4029 figures that appear in there showing the tonnages shipped to each town. I must assume that those are the figures as they appear in the records of the company. I can't at this time question the validity of the rates for the different classifications or the routing which they took, but I do very strongly object to the methods by which these figures have been put together to reach the results which it

sought to be shown in 213-A and in 214. It is highly misleading and it has no validity whatsoever. It involves, as has been shown on the examination so far, speculation, purest speculation. Here we have an allocation of business whether to truck loads or to less than car loads. They don't know which one they want, they don't know which way it was shipped so they split the difference, as to certain transactions in the par zone. As to certain transactions in the premium zones that allowed tonnages twice as large as those in the par zone.

The assumption is made they all went less than car loads. The effect of it is to raise the rate in the premium zone, and bring the justification of the raise of rates on an average basis, the validity of which I am certainly not going to accept. I can have no objection to the introduction of a figure of a poundage sold to these towns and the territories, but insofar as exhibits going beyond that point, I must object.

Mr. DuBose: If Your Honor please, Mr. Wright has not objected to tonnage and freight rates. He has
4030 picked out certain isolated instances, and we respectively urge he has a right to urge that objection, but it goes to the weight of the exhibit not to its admissibility. The document has been fully explained, how it was prepared. If it has errors, that is a matter of giving weight to the conclusions reached, but not to the admissibility of the records.

Mr. Wright: First of all, I object to the characterization "isolated instances." Furthermore, on the matter of weight, if this information is not put together in a proper form to reflect actually what was done, there is no question of weight, it is nothing, it can not mean anything. It is just not admissible. If either has weight or it is inadmissible. I say that the information about the manner in which it has been put together, which has been elicited previously and today, show that it is wholly unreliable and should not be admissible for that purpose.

Trial Examiner Norwood: Here are some documents that have some information, in the part of which is recognized as being correct, and information based on estimates and it appears clearly, as to some of them, that they based on estimates, and the witness has told us about that, and counsel may therefore cross-examine him on every item, so that it may appear just how this was made, and I think

that the matters which have been urged by Commission's counsel go to the weight of the document.

4031 Mr. Wright: Your Honor, the whole thing boils down to these two papers down here, 214 and 213-A. Let me call your attention as to how these were arrived at. On 213-A there is a listing of accounts sold in the various zones. As I say, while I am not conceding to the correctness of that, still I can't object to this. Column 2 has the total freight and tonnage. How is that arrived at. It was arrived at by multiplying something which has no validity to the end results. That multiplication can have no validity.

Mr. Ewing: The witness testified that he has gone over these matters with his associates and assistants and they know where they do business and with whom they do business. To break it down to isolated instances, as Mr. Wright has done, is to distort what he testified to.

Trial Examiner Norwood: I shall overrule the objection and receive the exhibits. I think those matters go to the weight of the exhibits. Counsel may go into it and show the correctness throughout. I don't think that at any time the receipt of documents in evidence show that the Trial Examiner thinks that every item is true.

(The documents referred to, heretofore marked for identification as RESPONDENTS' EXHIBITS 213-A, 213-B, 213-C, 213-D, 213-E, 213-F, 213-G, 213-H, 213-I, 213-J, 213-K, 213-L, 213-M, 213-N, 213-O, 213-P, 213-Q; 214, 162-A, 162-B, 162-C, 162-D, were received in evidence.)

4032 Mr. DuBose: Now that the preliminary direct and cross have been concluded and the documents have been received, I have some further direct on the documents just admitted in evidence.

Trial Examiner Norwood: Go ahead.

Direct Examination by Mr. DuBose.

Q. Mr. Higgins, I show you Respondents' Exhibit 213-B in evidence, and I call your attention to a shipment from St. Louis to Alton, Illinois, or shipments, rather, for the year 1941 in the total amount of 51,576 pounds, which total poundage is more than one car load; is that correct?

A. That is correct. At that time 20-ton cars.

Q. Twenty-ton cars, that makes it 40,000 pounds?

A. That is correct.

Q. And the applicable rate given there was twenty

cents, which I take it is the L. C. L. rate from St. Louis to Alton?

A. That is correct.

Q. I call your attention to another item on the same exhibit relating to par zone shipments for 1941 from St. Louis to Bloomington in the total amount of 52,375 pounds to which was applied the rate of thirty-seven cents. Is that the L. C. L. rate?

A. That is the L. C. L. rate.

Q. I call your attention to the same exhibit on
4033 which appears a shipment from St. Louis to Jacksonville, Illinois in the total poundage of shipment for the year 1941, in the total amount of 47,662 and ½ pounds to which was applied the rate of thirty cents. Is that the L. C. L. rate?

A. That is the L. C. L. rate.

Q. I call your attention again to another shipment in the par zone on the same exhibit from St. Louis to Mattoon, Illinois, which shipment for 1941 totaled 52,049 and ½ to which was applied the rate of thirty-four cents. Is that the L. C. L. rate?

A. That is correct.

Q. Now, Mr. Higgins, you have testified that in determining what rate was applicable you had a round table conversation with other members of the St. Louis branch staff; is that correct?

A. That is correct.

Q. You have the records showing who the customers are?

Mr. Wright: Your Honor, I object to the leading character of these questions.

Mr. DuBose: I will withdraw the last question.

By Mr. DuBose:

Q. Do you have records or does anyone in your office know the identity of the particular customers in these particular towns?

A. We all know the individual customers.

4034 Q. Now, would you know from your experience in the St. Louis branch and from the collective experience of the other members with whom you consult whether or not ordinarily a particular customer is a carload or truck load customer?

Mr. Wright: I object to that question, Your Honor, it was leading, it was putting the words in the witness'

mouth, and it called obviously for conclusions, which could only be hearsay.

Trial Examiner Norwood: Read the question.

Mr. Wright: I might say I don't mind so much counsel testifying for the witness in identifying the documents, but I do object to characterizations after they are in the record.

I think the witness can be allowed to testify for himself.

Mr. DuBose: It was a direct question, Your Honor.

Trial Examiner Norwood: Read the question.

(Last question read by the reporter.)

Trial Examiner Norwood: I think that contains the answer. Objection sustained.

By Mr. DuBose:

Q. All right, Mr. Higgins, from your experience in the company of twenty years, your experience with the sale of white lead in oil, do you in many instances know the category in which a customer will fall; yes or no?

A. Yes.

4035 Q. Now, what categories do customers fall into?

A. First, L. C. L. shipments. An order comes in to the desk, many orders. The orders are looked over and sorted, the shipment from St. Louis is entered with a notation on it, and sent to the Traffic Department and the shipment is made. If the shipment is from Minnesota, North Dakota or any of the territory adjacent to the branch warehouses, it is automatically sent to the Omaha warehouse or St. Paul warehouse, whichever the case might be, and the order is entered through our Order Department and allocated to that branch warehouse where the shipment is made.

Q. Let me ask you this question, Mr. Higgins: Do you know, ordinarily, in what quantity a particular customer located in a particular town will buy white lead in oil?

A. I think I do.

Q. In your discussions with the other members of the St. Louis staff, when you were estimating whether or not shipments to particular towns were truck loads or car loads or combinations of both, did that element, namely, whether or not—withdraw that.

In your discussions with other members of the St. Louis branch at which you reached the conclusion that as to particular towns there should be an average between truck loads and L. C. L., did your knowledge of whether ordi-

narily a customer located in that particular spot
4036 purchased L. C. L. or other quantities enter into that estimate?

Mr. Wright: Objection.

Mr. DuBose: I don't see why. That is perfectly proper.

Trial Examiner Norwood: What is the ground?

Mr. Wright: It starts off by putting several conclusions and an assumption of fact in the witness' mouth before he can arrive at an answer to the question.

Trial Examiner Norwood: Read the question.

(The question was read by the reporter.)

Trial Examiner Norwood: I think it is in evidence that he did have this consultation and come to that conclusion.

Mr. Wright: Your Honor, I asked the witness what distinction he made on cross-examination and he could not give me a satisfactory answer and counsel is giving him a tailor-made distinction in his question.

Mr. DuBose: I object to that. It is perfectly clear these people knew the customers in particular towns and as a result of that knowledge they decided whether it should be a truck load or car load. I am trying to find out what he knew about the customer which led him to that conclusion.

Mr. Wright: Can't the witness be asked what made him reach that distinction?

Mr. DuBose: All right, I will ask him.

Trial Examiner Norwood: Question withdrawn. Go on.

4037 By Mr. DuBose:

Q. Mr. Higgins, I show you Respondents' Exhibit 213-B, for identification which shows a shipment for 1941 in the par zone from St. Louis to Decatur, Illinois and the total amount of 158,112 and ½ pounds to which was applied the rate of twenty-seven cents, which is an average between truck loads and L. C. L. What considerations were taken into account in arriving at this figure of twenty-seven cents which is the average between truck loads and L. C. L.?

A. I am perfectly acquainted with the customers in Decatur, Illinois. Their business, tonnage that they have handled in previous years and the tonnage they handled in 1941, to the best of my knowledge, the division of the truck load to certain customers and division of L. C. L. where the rate was twenty-two cents for the truck load and thirty-two cents for the L. C. L., gave us the average of 27 cents on 158,112 and ½ pounds, which is in my opinion,

the correct rate applicable to that tonnage going to Decatur for the year 1941.

Q. Why is that, in your opinion, a correct estimate?

A. Because some of the customers at Decatur would take shipments from truck loads while there are a number of other customers who would get only L. C. L. shipments.

Q. Now, when you made a similar study with the others in the St. Louis branch, in connection with all these white lead in oil shipments for 1941, and when you deter-
4038 mined what you thought was the applicable rate, did the same consideration enter into your mind and were they taken into account at that conference?

A. That is correct. They came to my desk and we spent hour after hour going over the details and studying each town on that list.

Q. Now, Mr. Higgins, how long have you been connected with the sales of white lead in oil by the St. Louis branch, white lead in oil department?

A. I have been with the National Lead Company 37 years, and to my knowledge, my memory, it was in 1930 when I went into the white lead department.

Q. And since 1930 have you been in close contact with the sales of white lead in oil by the St. Louis branch of the National Lead Company?

A. That is correct.

Q. And when you arrived at the applicable rate, did the applicable rate, which is shown on these exhibits 213-A through Q, inclusive, represent in your opinion the applicable rate based upon your experience and knowledge of the sales by the St. Louis branch of white lead in oil?

Mr. Wright: Objection, same objection.

Trial Examiner Norwood: Sustained. That has the answer in it.

By Mr. DuBose:

4039 Q. Now, Mr. Higgins, when you obtain or receive, rather, from the home office the letter asking for this information, did that letter state for what purpose the information was sought?

A. I do not recall the details. I saw a copy of the letter. It was not addressed to me, but I think I testified previously that I knew what the information was wanted for.

Q. You did know?

A. I think I did.

Mr. DuBose: No further direct.

Cross-Examination by Mr. Wright.

Q. Who are these customers in Decatur?

Mr. DuBose: I object to that on the ground it will disclose confidential trade information.

Trial Examiner Norwood: I don't think so.

Mr. Wright: If he is going to rest on that, I would like to have stricken from the record the exhibits regarding the names in this case.

Trial Examiner Norwood: Objection overruled. Go ahead.

Mr. DuBose: You mean names of customers?

Trial Examiner Norwood: Yes, in 1941.

By Mr. Wright:

Q. What were the names of customers who bought 4040 white lead in oil?

A. Black Hardware Company. Decatur Paint and Varnish Company. Those two accounts are large buyers.

Q. They would customarily be shipped in truck loads?

A. That is correct, sir.

Q. Who are your customers in Duluth, Minnesota?

A. Marshall Wells Hardware Company.

Q. That is a very large concern, isn't it?

A. Very large hardware concern.

Q. I assume this tabulation for your shipments would be less than car loads since that is the way it is set out in the tabulation?

A. What was that?

Q. I was asking you, since it is indicated all shipments to Duluth are less than car load, to St. Paul they were less than car load or less than truck load?

A. That is correct. We had the Kelly Thompson Company and Pierson Paint Company, St. James & Company.

Q. Marshall Wells is wholesale hardware company?

A. That is correct.

Q. How would you estimate its business would compare to Decatur Hardware Company or Black Hardware Company as to relative size in volume?

A. No comparison, Marshall Wells is a big concern covering six or eight states and Black Hardware does 4041 not have as much business and does both jobbing and retail business, covering Illinois and portions of Indiana and some southern territory.

Q. Is it principally a retailing concern?

A. I would say that they did a large jobbing business, because years ago they purchased many, many car loads from us.

Q. Marshall Wells would be many, many times larger as an enterprise?

A. There is no question about that, sir.

Q. Who are your customers in St. Joseph, Missouri in 1941, which I am speaking of?

Mr. DuBose: Your Honor, I was not being facetious before with my objection. Now, there are certain trade secrets and the names of customers certainly should not be divulged on a public record here.

Mr. Wright: This is the first time that this question has come up. We have long tabulations with the names of customers on them.

Trial Examiner Norwood: A reasonable number of questions may be asked to test this witness' knowledge, and this goes to that, and I think he may ask him what the names are to see if he knows who they are.

Mr. Wright: There are already in the record lists of customers in practically every town in the United States during the period of 1941 and there was no objection on any of the respondents' parts to supplying that infor-
4042 mation. They were very cooperative about it. We prepared those tabulations, now in evidence, in corroboration with the respondents, you might say.

Trial Examiner Norwood: I think the names of a few of these customers is a sufficient number to test this witness' knowledge and will not prejudice the respondents in any way.

Mr. DuBose: I assumed he was going to offer every town and every state.

Trial Examiner Norwood: I don't think so.

Mr. Wright: I assure counsel I have no intention of doing so.

Trial Examiner Norwood: Objection overruled.

The Witness: St. Joseph, Missouri?

By Mr. Wright:

Q. Yes.

A. Hyatt Hardware Company and there are five or six more concerns with a branch of Cooks warehouses.

Q. Hyatt is a large concern?

A. Yes.

Q. Are they similar to the ones in Decatur?

A. They cover a larger territory.

Q. Covering a larger territory than the ones in Decatur?

A. That's right.

Q. I believe you stated before, Mr. Higgins, none
4043 of the information we have here, either as to town or as to cardage or as to freight, contains anything which can not be properly attributed to white lead in oil, in flatting, linseed oil, red lead in oil, no white lead points?

A. That is correct.

Q. Isn't it customary for large warehouses of hardware store to order a variety of mixed shipments, a variety of products, particularly out of the warehouse, and don't orders customarily include other things other than white lead in oil?

A. They take different freight classifications.

Q. Shipped together?

A. Mixed. White lead in oil would take one hundred pounds or more.

Q. Excuse me.

A. White lead in oil would take one hundred pounds or more for the minimum rate to apply.

Trial Examiner Norwood: We will take a brief recess.

(A five-minute recess was taken.)

Trial Examiner Norwood: Proceed.

By Mr. Wright:

Q. On your dry white figures here, Mr. Higgins, Exhibit 162-A through D, I believe the testimony was par is everything east of the Rocky Mountains?

A. That is correct.

Q. Now, are you thoroughly familiar with the
4044 warehouse procedure on handling shipments in pool?

A. Pool cars would not be handled in the warehouse, they would be handled from St. Louis.

Q. Do you handle cars from St. Louis?

A. Are you speaking of 1941, sir?

Q. Yes.

A. I do believe there were no pool cars during 1941.

Q. Were there any in the three years prior to 1941?

A. There may have been.

4045 Q. Now, getting back to Decatur, Illinois, I think your comment there on white lead was—no, let's take

Quincy, your poundage on white lead was 66,000 pounds. You are familiar with the customers and trade there in Quincy?

A. Yes, sir.

Q. Approximately how many pounds, altogether, of all products of the National Lead Company sold in Quincy, all the other items like flattening, red lead, mixed paint colors in oil, dry colors, linseed oil, all the other products?

A. We may or may not sell all of those items to one or two major accounts in Quincy. I have it in mind there was one account that had the best turn-over in handling shipments in truckloads. He turned his stock a number of times a year which was good business so therefore I have Quincy fairly well in mind. We may not sell all the products, we would sell him white lead in oil, red lead in oil, dry red lead, he may purchase linseed oil from us, but I think he has linseed oil connections which he purchases elsewhere.

Q. How about flattening oil, dry colors, colors in oil?

A. Colors in oil is a comparatively small item and I believe at that time we were not handling colors in oil, although I am not sure. We took that up later.

Q. How would his total poundage of other products, this customer you are talking about, compare with the poundage of white lead in oil?

4046 A. There would be no comparison at all, sir.

Q. Can you give us an estimate or comparison, it need not be exact, say three times as much white lead in oil as other products, two times as much, about the same amount?

A. I would say his tonnage is 90 per cent lead in oil and 10 per cent the other.

Q. Aren't there towns in which you have accounts whose purchase of a larger percentage of white lead in oil is larger than this particular account?

A. In 1941 we were confined entirely to white lead in oil, red lead in oil, and we did not have the other ramifications of the paint business that some of the other branches may have had, at that time.

Q. You handle quite a bit of linseed oil out at the St. Louis branch?

A. We handle a great deal of linseed oil for manufacturing purposes.

Q. You handle that under the Dutch Boy label?

A. Whenever we have brought in linseed oil in carloads in St. Louis, we have brought them in in five-gallon and one-gallon containers. We have never, at St. Louis, been a factor in the linseed oil business.

Q. You serve the whole trade in the St. Louis branch area Dutch Boy linseed oil, in Dutch Boy containers?

A. We do now.

4047 Q. Who services that area?

A. For instance, Northwest, you have individual customers such as large national concerns, and the major portion of the linseed oil business is taken there. I don't recall that we sold it in cans.

Q. By the National Lead Company?

A. So when we speak of linseed oil, we in St. Louis are confining our major production to the manufacture of white lead in oil and red lead in oil.

Q. How about flattening oil?

A. Flattening oil we do not manufacture. We bring that in in carloads from the East and manufacture where we have a demand.

Q. You receive Dutch Boy flattening oil throughout that area?

A. That is right.

Q. In 1941, approximately how many pounds of that would the St. Louis branch sell, can you give me an idea?

A. Oh, five or six carloads we covered it.

Q. You don't know what the situation is with reference to the other branches as to those products?

A. I am not familiar with that detail.

Q. Now, when you were here last, Mr. Higgins, you stated that these documents which were then offered in evidence had been correct and represented the best that could be done as far as getting these figures, is that correct?

A. I misunderstood the question. Are you speaking of today?

4048 Q. No; when you were here last in New York.

Mr. DuBose: Last June.

By Mr. Wright:

Q. Last June?

A. That is correct.

Q. Since that time you have gone over them and you have found actually there were a lot of discrepancies in those figures?

A. I checked over the white lead in oil and dry products and found errors that should not have been in there.

Q. Do you suppose if you were to do that again now that you might similarly find the same sort of mistakes and errors in computation and allocation of the freight rates to customers?

A. I do not believe so. I think that that record that I brought here represents the best job the St. Louis branch can do, and I think myself it is one hundred per cent correct.

Mr. Wright: No further examination.

Mr. DuBose: No further examination.

Trial Examiner Norwood: Thank you, Mr. Higgins.

(Witness excused.)

Trial Examiner Norwood: Call your next witness.

Mr. DuBose: Mr. Owens.

4049 THOMAS OWENS was thereupon called as a witness for the respondents, and having been first duly sworn, testified as follows:

Direct Examination by Mr. DuBose.

Q. Mr. Owens, will you tell me by whom you are employed?

A. National Lead Company, Executive Office.

Q. In what capacity?

A. Office Manager in the Accounting Department.

Q. Office Manager of the Accounting Department?

A. Yes, sir.

Q. Now, will you tell us when you first came with National Lead and what positions you have had with National Lead since that time?

A. I have been continuously employed by the National Lead Company since June of 1934, first in the position of office boy, then as general accountant, cost accountant, traveling auditor, and finally office manager.

Q. Now, when did you become a traveling auditor, do you recall?

A. Beck around 1940.

Q. And when did you become a general cost accountant in the Home Office?

A. About December, 1942.

Q. And when did you assume your present position as office manager, general accounting office, in the Home Office?

4050 A. February 1, 1947.

Q. Now, did you or have you received a degree from a university?

A. Yes, sir, Bachelor of Science in Accounting, New York University.

Q. When did you receive that degree?

A. In June of 1941.

Q. Now, since 1940 you have been generally familiar with the accounting department in the Home Office?

A. Yes, sir.

Mr. DuBose: I ask that these documents, Respondents' Exhibit 215-A and B be marked for identification and these two, 216 for identification and 217.

(The documents referred to were marked Respondents' Exhibits 215-A, 215-B, 216 and 217 for identification.)

By Mr. DuBose:

Q. Mr. Owens, I show you Respondents' Exhibit 215-A and B for identification and I ask you to tell us generally what these figures purport to show, what these documents are, generally?

A. These figures show columnar arrangements of the five white lead manufacturing plants in the National Lead Company, total weight in pounds shipped various cities throughout the United States, car load freight rates, l.c.l. freight rates, customer locations, extensions, and also

4051 car load freight rates from the manufacturing branch to the customer, total cost, l.c.l. freight rates from the manufacturing branch to the customer and extensions.

Q. And to what product does this document relate?

A. Dry white lead.

Trial Examiner Norwood: That is 215 he is talking about?

Mr. DuBose: 215-A and B, dry white lead.

By Mr. DuBose:

Q. Now, in the second column, the second column from the left under the heading "Weight in pounds," are certain figures and there is another column entitled "Customers Allocations." Do these weights include all the customers in that location or only a particular type of customer?

A. These figures apply only to the car load customer in that location.

Q. How did you determine who or what companies were car load customers and from what source did you obtain the weight in pounds?

A. We have records indicating the total shipments of dry white lead to our various customers throughout the United States.

Q. You say we have. Where are those records located, and what do they consist of?

A. 111 Broadway, a loose-leaf book arranged by 4052 states, and cities in these states.

Q. Is that in any particular department?

A. That is in the dry white lead selling department. From those records we were able to determine the car load customers and the l.c.l. customers.

Q. Now, do those records show the names of the customers?

A. Yes.

Q. Now, how do you determine who are the car load customers?

A. From information supplied to us by the dry white lead selling department. They went through the entire records and picked out the car load customers and distinguished them from the l.c.l. customers.

Q. And was it headed the dry white lead department?

A. It was.

Q. And did you sit down with anyone when you were seeking these customers?

A. I did, with the head of the dry white lead department.

Q. And those purport to be all of the car load customers for 1941 for all the branches of the National Lead Company, so far as dry white lead is concerned, for the year 1941?

A. Yes, sir.

Q. Now, the first column on the left is headed "Manufacturing Branch," and underneath that first entry, "Pacific Coast, Melrose, California." What does that mean?

A. The National Lead Company Pacific Coast 4053 Branch operating a plant at Melrose.

Q. Which manufactures dry white lead?

A. Dry white lead at that point.

Q. And do all of the items in the succeeding columns

from left to right down to the name "St. Louis" apply to operations by the Melrose California plant?

A. Right.

Q. Now, take the first entry under the column "Weight in Pounds," and extending that over to the right under "Customers Location," "Town of Los Angeles, California," does that weight mean that that amount was sold from 1941 to car load customers in Los Angeles?

A. It does.

Q. The third column is entitled "l.c.l. rate, c.w.t."?

A. That represents the car load freight rate from the manufacturing branch to the selling branch.

Q. What is "c.w.t."?

A. Per hundred pounds.

Q. The fourth column is entitled "Selling branch," and underneath that all the way down there are certain names. What does that refer to?

A. That refers to the fact that the customer is located in the territory of that particular selling branch.

Q. In other words, first you have manufacturing branches and then the selling branch, which actually
4054 handles the sale; is that correct?

A. Yes.

Q. In the fifth column, under the heading, "Cost", although there are not any entries under Melrose, there are under some of the other branches; will you tell us what that refers to?

A. That cost would have reference to the car load rate from the lead company manufacturing plant to the lead company selling plant, in this instance is the manufacturing branch which is the same as the selling branch. There is no entry in that column.

Q. Now, under the next column—withdrawn. The sixth column is headed, "l.c.l. rates, c.w.t." What does that refer to?

A. That refers to less than car load rate, from the selling branch to the customer.

Q. Now, you have already explained that the customer's location is the location of the car load. Under the eighth column, or rather the eighth column which is entitled, "Cost", and there are certain figures under that; what is that figure, what do those figures in that column represent?

A. Those figures represent the cost of l.c.l. shipments from the selling branch to the customer.

Q. And the next column is under the heading, "Total Cost." What does that total cost represent?

A. That total cost represents the cost of a ship-
4055 ment, car load rates, from the manufacturing branch to the selling branch and the l.c.l. rate from the selling branch to the customer's location.

Q. Now, going over to the right two columns and several spaces above that, there is a heading, "M. F. G. Branch to customer." What does that refer to?

A. That refers to a shipment from the manufacturing branch directly to the customer at a car load rate.

Q. And underneath that are the two separate headings, "c.l. rate, e.w.t." and "total cost." What do they refer to, what do those headings represent?

A. c.l. rate per hundred pounds and the extension of the total weight should be in pounds by the car load freight rate.

Q. In other words, the rate is the car load rate from the manufacturing branch direct to the customer at his location?

A. That is right.

Q. And the total cost would be the car load rate times the number of pounds of dry white lead shipped from the manufacturing branch to the customer?

A. That is correct.

Q. Now, two columns over further is the general heading, "MF Branch to Customer," and underneath that subheading "l.c.l. rate and total cost." Will you tell us what those columns represent?

A. Those columns represent cost of shipping
4056 l.c.l. rate from the manufacturing plant directly to customer, and l.c.l. less than one hundred pounds, less than car loading rates applying from the manufacturing plant to the customer's location, plus the total pounds shipped to obtain the total cost.

Q. Mr. Owens, you told us under the second column weight and pounds you obtained those figures from the records of the sales department of dry white lead at 111 Broadway; is that correct?

A. That is correct.

Q. From what source did you obtain the car load and l.c.l. rates?

A. Car load and l.c.l. rates were obtained from the National Lead Company Traffic Department.

Q. Under whose supervision were those rates prepared for you?

A. Mr. Werner, I believe.

Q. Now, are similar figures and shipments and calculations made for the St. Louis, Chicago, Atlantic, Perth Amboy, Philadelphia manufacturing branches of the National Lead contained on Respondents' Exhibit 215-A and B for identification?

A. Yes.

Q. And in each case the particular figures applicable to each manufacturing branch begin with the first entry opposite the name of the particular manufacturing branch?

A. That is correct.

Q. Now, I show you Respondents' Exhibit 215-B,
4057 for identification and the figures opposite the words "Grand Total"; are they the summary of all other figures which appear on 215-A and B?

A. That is correct.

Q. In those columns?

A. Yes.

Q. So that there you have the grand total of the weight in pounds of dry white lead sold by the National Lead Company in all of its branches for carload customers in 1941; is that correct?

A. That is correct.

Q. And under the fourth column, or rather, the next figure opposite "Grand Total" is the total cost at carload rates shipped from the manufacturing branch to the selling branch; is that correct?

A. That is correct.

Q. Where that occurred?

A. Where that occurred.

Q. Then the next figure is the total cost, is it not, of the l.c.l. rate from the selling branch to the customer location where that occurred?

A. That is correct.

Q. And the next figure is the total cost of the last two items, or a summary of the total of the last two items?

A. That is correct.

4058 Q. Then the next figure opposite "Grand Total" is the total cost at carload rates on direct shipments from the manufacturing branch to the customer; is that correct?

A. That is correct.

Q. A 1 the final figure opposite "Grand Total" is the total cost on direct shipments from the manufacturing branch to the customer at the l.c.l. rate; is that correct?

A. That is correct.

Q. And down at the bottom of the page, on the left-hand side, opposite the heading or the notation "Manufacturing Branch to Selling Branch to Customer, l.c.l.," are certain figures. Now, the weight in pounds is the same as the grand total; is that correct?

A. That is correct.

Q. And the next figure represents the total cost of carload shipments through the selling branch and l.c.l. branch from the selling branch to the customer; is that correct?

A. That is correct.

Q. And the third figure is the cost per hundredweight; is that correct?

A. That is correct.

Q. Now, the next heading, or the next notation, that is, "Manufacturing Branch to Customer, l.c.l.," with the same total weight in pounds, is that correct?

A. Yes.

4059 Q. And the next figure represents the total cost of shipping that weight direct from the manufacturing branch to the customer and the carload rate?

A. That is correct.

Q. And the third figure represents that breakdown per hundred pounds?

A. Correct.

Q. And the last entry is the manufacturing branch to customer, l.c.l., with the same total weight in pounds; is that correct?

A. Correct.

Q. The next figure represents the cost of shipping that total weight directly from the manufacturing plant to the customer at the l.c.l. rate?

A. Correct.

Q. Now, the third entry is the mathematical cost per hundredweight?

A. Correct.

Q. Now, I show you Respondents' Exhibit 216 for identification, and I ask you generally what that purports to be?

A. On this sheet we have prepared figures for the years 1939, 1940, and 1941, which represent selling and admin-

istration expenditures of the Atlantic branch of the National Lead Company. In addition, we have the number of invoices which this branch processed during the years 1939 to 1941, and we have obtained an average cost per invoice. We have then made a comparison of the
4060 freight cost and invoice cost when the shipment moved directly from the manufacturing plant to the customer in carload quantities, to compare that with the same cost when the shipments moved from the manufacturing branch to the customer in less than carload quantities.

Q. In less than carload quantities in what particular quantities?

A. Carload of 20 tons while l.c.l. are quantities of 5 tons.

Q. What else does it show?

A. We also have a comparison of cost of freight and invoice cost, shipments from a manufacturing plant to a customer in carload quantities of 20 tons as compared to a freight and invoice cost of a manufacturing plant shipping to the selling branch in carload quantities and reshipping to the customer in l.c.l. quantities of five tons.

Q. Now, taking Respondents' Exhibit 216 for identification, the figures under the headings "Mfg. Br. to Customer, C. L.," manufacturing plant to customer, l.c.l., and manufacturing branch to selling branch, c.l., selling branch to customer, l.c.l., together with the representation of manufacturing to customer c.l.w., those were taken and were made up from the results reached on Respondents' Exhibit 215-B; is that correct?

A. That is correct.

Q. In other words, in the three categories that
4061 you have on 215-B, taking the total weight sold figured in the three methods, one carload to selling branch, l.c.l. to customer, second carload on direct shipment from the manufacturing branch to the customer, and the third, l.c.l. cost from the manufacturing branch direct to customer, are all reflected in this calculation which you made on a 20 and 5-ton basis, is that correct, on Exhibit 216?

A. That is correct.

Q. Now, in the middle of the page on the left, under Freight Cost and Invoice Cost, which are the figures showing the comparison between the cost of shipping 20 tons and 5 tons, manufacturing branch to customer, c.l. for 20 tons, manufacturing branch to customer l.c.l. for five tons,

underneath that heading on the left is the pencil notation "Per Ton Cost," and the figures under "Manufacturing Branch to Customer," carloads with 20 tons, is the cost per ton of shipping direct from the manufacturing branch to the customer at the carload rate based upon the averages worked out on 215-A and B; is that correct?

A. That is correct.

Q. And the next figure to the right, showing manufacturing branch to customer, l.c.l., for five tons, shows the per ton cost of shipping per ton on an average of those figures in 215-A and B, plus the invoice cost for that particular shipment; is that correct?

A. That is correct.

4062 Q. Over on the right is the difference per ton, or the excess of the l.c.l. shipments for 5 tons per ton over the carload shipments for 20 tons; is that correct?

A. That is correct.

Q. And a similar study is made with respect to the per ton cost freight and invoice, with respect to shipments in a comparison of shipments of 20 tons direct from manufacturing branch to customer at carload rates and l.c.l. 5-ton shipments from manufacturing branch to selling branch at the carload rate and selling branch to customer at the l.c.l. rate; is that correct?

A. That is correct.

Q. Now, you have on Respondents' Exhibit 216 for identification, toward the top of that exhibit, and opposite the notation "Cost per invoice average," certain figures under the headings 1939, 1940, 1941. You have also above that a total figure for administrative expenses for those three years and selling expenses. Will you tell us what Respondents' Exhibit 217 for identification represents?

A. Exhibit 217 represents the total selling and administrative expenses for the Atlantic branch for the years 1939, 1940, and 1941, and the individual expenses account for the making up of the administration and selling expenses.

Q. Does it also show the total number of invoices entered by the Atlantic branch or processed by the At-

4063 lantic branch in those three years?

A. It does.

Q. And what did you take into account in setting up or picking out certain items that went into the total administrative account as well as the items which go under total selling expenses?

A. We have taken all the recognized expenses, administrative and selling, which go into the cost of doing business, taking them from the records of the United Branches for the years '39, '40, and '41.

Q. And you have divided the number of invoices for those particular years, 1939, 1940, and 1941, into the total administrative and selling expenditures to arrive at the cost for individual invoice?

A. That is correct.

Q. And the three figures in the lower right-hand corner of Respondents' Exhibit 217 are the figures showing the invoice cost figured in the manner you have just explained for the three years 1939, 1940, and 1941?

A. That is correct.

Q. That means that on the average, as you have there prepared it, the cost so much to prepare a single invoice, is that what that figure represents?

A. That is correct.

Q. Now, going back to Respondents' Exhibit 216 4064 for identification, toward the upper right-hand corner, opposite the words "Cost per invoice," the same figures which appear, are they not, at the bottom of Respondents' Exhibit 217; is that correct?

A. That is correct.

Q. On the later tabulation on Respondents' Exhibit 216 there is a figure representing invoice cost which is different from any one of the three figures representing cost per invoice under 1939, 1940, and 1941. What is that other figure?

A. We have averaged the invoice cost for the three years which gave us the average cost for the three years of $7.45 per unit.

Q. And that is a simple mathematical average. You added the three invoice costs, the unit cost for 1939, 1940, and 1941, and divided by three; is that correct?

A. Yes.

Q. Going back to Respondents' Exhibit 215-A for identification, Mr. Owens, under the sixth column entitled l.c.l. rate, cwt., are certain figures representing you explained the l.c.l. rate from selling branch to customer's location. Now, under the heading selling branch, will you take for example Cleveland, and the customer's location for that particular shipment is Cleveland, the same town. Now, the figure applicable to that is what, under the l.c.l. rate, cwt.?

A. Five cents per hundred.

Q. What does that mean? Is that the train l.c.l. rate?

4065 A. That is the lowest truck load rate. Throughout these computations we use 5 cents a hundred trucking rate in the same city limits.

Q. And so that where under this particular column the figure .05 is used, what you figured as the lowest truck load rate from the selling branch to the customer's location; is that correct?

A. That is correct.

Q. And the other figures thereunder are the rail l.c.l. rates from selling branch to customer's location; is that correct?

A. That is correct.

Mr. DuBose: May we go off the record a minute?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Mr. DuBose: Back on the record. At this time I offer in evidence 215-A and B for identification, Respondents' Exhibits 216 for identification, and 217 for identification.

Mr. Wright: Well, Your Honor, I would like to have sufficient time to examine these very complicated documents before cross-examining Mr. Owens on them. I thought that we were reaching the tag-end. I didn't think we would run into an elaborate accounting job as this.

Trial Examiner Norwood: Do you want their records to come back tomorrow?

4066 Mr. Ewing: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: We will recess until 2:00 o'clock. The witness Owens will be back tomorrow morning at 9:00 o'clock.

(Whereupon, at 12:00 o'clock noon a recess was taken until 2:00 o'clock p. m., of the same day.)

4067 Afternoon Session.

2:00 p.m.

Trial Examiner Norwood: The hearing will come to order.

Mr. Wright: What is the Commission's next exhibit number?

Trial Examiner Norwood: 860 is the last I have.

Mr. Wright: I'd like to ask that these be marked as Commission's Exhibits 861-A and sub numbers; and that these be marked Commission's Exhibits 862-A and sub numbers; and that this one be marked Commission's Exhibit 863.

(The documents referred to marked Commission's Exhibits No. 861-A through G; 862-A through O; and 863, for identification.)

Mr. Wright: Your Honor, yesterday there was admitted into evidence Respondents' Exhibit 154-A through F through the witness Tibbets who produced as the basic data from which 154-A to 154-I was compiled a quantity of—

Trial Examiner Norwood: Wait a minute. That was one of the exhibits that wasn't received.

Mr. DuBose: Yes, sir, that was received.

Mr. Wright: That was in evidence after page 4000 according to the transcript.

Trial Examiner Norwood: All right. I just omitted to put it down here.

4068 Mr. Wright: Yes, sir.

Trial Examiner Norwood: Go ahead.

Mr. Wright: The basic data from which that exhibit was compiled was supplied to me by counsel for the National Lead Company, and I would like to ask the counsel for the National Lead Company to stipulate on the record that Commission's Exhibit 861-A through G is a true copy of the price cards on dry white lead, basic lead sulphate from a period beginning on December 30, 1932 running down to May 11, 1942.

Mr. DuBose: I so stipulate.

Mr. Wright: I would like to ask counsel for the National Lead Company to agree that Commission's Exhibit 862-A through O are copies of price cards of the National Lead Company on lead oxides or litharge, dry red lead, and orange mineral running from May 31, 1933 through

January 14, 1942 as supplied in support of Respondents' Exhibit 154 and sub numbers.

Mr. DuBose: I so stipulate.

Mr. Wright: I would like to ask counsel to identify Commission's Exhibit 863 as photostatic copies of various price lists on white lead published by the Atlantic Branch and the Boston branch of the National Lead Company as of March 1, 1937.

Mr. DuBose: I will so stipulate, with the statement that I assume that the handwritten material on one of
4069 these price cards is part of the exhibit.

Mr. Wright: Well, I will say that all of the handwritten material that might appear on all of these things was on them as they were supplied by the National Lead Company, presumably as part of all the exhibits.

Mr. DuBose: Then I so stipulate.

Mr. Wright: Now, I would like to offer Commission's Exhibits 861, 862 and 863 with the various sub numbers in evidence.

Mr. DuBose: No objection.

Trial Examiner Norwood: Received.

(The documents referred to, previously marked for identification, received in evidence as COMMISSION'S EXHIBITS NO. 861-A through G, 862-A through O, and 863.)

Mr. Wright: May we take a short recess?

Mr. DuBose: A three-minute recess?

Trial Examiner Norwood: All right.

(At 2:40 p.m. a brief recess was taken.)

Mr. Welch: Your Honor, we have a short stipulation.

Trial Examiner Norwood: Go ahead.

Mr. Welch: It is hereby stipulated and agreed by and between counsel for the Federal Trade Commission and counsel for Sherwin Williams that if S. B. Coolidge were recalled as a witness in this proceeding he would testify that the testimony which he gave at a hearing held in
4070 Cleveland, Ohio, on July 25, 1946, and which appears at pages 1311-1333 of the record and the statement of Sherwin Williams' counsel at pages 1529-1530 of the record did not fully and correctly state the freight policy of the Sherwin Williams Company as to lead products involved in this proceeding, and if he were further questioned as to Sherwin Williams' freight policy for such products his testimony with respect thereto would be the same as the testimony of H. C. Lemke, who testified in this

proceeding on October 16th and 17th, 1947, and he would adopt such testimony in toto as his own.

He would also testify that the lead products sold by Sherwin Williams on the Pacific Coast are purchased by it from W. P. Fuller & Company and from Premier Paint and Color Works, who manufacture such products on the Pacific Coast, and that shipments of such products from Chicago to the Pacific Coast area are made only when such products may be included in isolated car load shipments of paint products to the Pacific Northwest Coast Area.

He would also testify that Sherwin Williams does not manufacture, and for at least 20 years has not manufactured, red lead or litharge for use by battery manufacturing industries.

It is further agreed that for the purposes of this proceeding it shall be considered that S. B. Coolidge has appeared and has testified to the foregoing effect.

4071 Now, it is my understanding that Mr. Wright agrees to that stipulation with a modification—not a modification, but an additional statement which he will want to tender and to which I will agree.

Mr. Wright: I want the record to show that I will so stipulate with the following proviso, that as to the business of the Sherwin Williams Company on the Pacific Coast, that it is agreed by counsel in the proceeding that I may have the right to request a reopening for the purpose of producing evidence or testimony on that point alone and for that limited purpose, within a period of two weeks from today, on proper notice given to all parties. With that provision, I am willing to stipulate and agree as stated by Mr. Welch.

Mr. Welch: And I agree to the provision.

Mr. Wright: I would like further to add that as a part of this, it is understood by counsel that the time within which I have to give notice to counsel of a reopening for the limited purpose stated won't operate to hold up any other phase of the matter, and that for all other intents and purposes the record may be closed prior to that time.

Trial Examiner Norwood: Yes. That is understood.

Mr. Ewing: While we are waiting for those documents, I think I can make a statement now for the record with respect to Mr. Rowe.

4072 Mr. Harold Rowe, a Vice President of National Lead Company, who has heretofore testified in this

proceeding as a witness called by the Commission, suffered a stroke on March 24, 1947, and since that date has been confined to his home without the power of speech. Mr. Rowe, had he not been so stricken at that time, which was shortly prior to the time the respondents' case began to go in, would have been called as a witness for the respondent National Lead, but for that reason he cannot be recalled. And it is my understanding that that statement of fact is accepted by counsel for the Commission and that under those circumstances it is unnecessary for me to call Mr. Rowe's physician to so testify.

Trial Examiner Norwood: Yes.

Mr. Wright: I am perfectly agreeable to that statement without any inferences that might arise from it. I am willing to agree that Mr. Rowe is so incapacitated and that he might have been called.

Mr. Wood: I would like to make a statement.

Trial Examiner Norwood: Go ahead.

Mr. Wood: I would like to state for the record that Mr. A. E. Bendelari, who was President of the Eagle-Picher Company approximately during the time of the NRA, and whose name appears on various documents, is still alive but living in retirement outside of Lexington, Kentucky. He has a bad heart condition and does 4073 not have a clear memory of all of the events in question.

I would also like to state that Mr. R. M. Roosevelt, who was a vice president of the Eagle-Picher at that time, has not been connected with the company since 1937 and is now living in Connecticut, but he is totally disabled.

Mr. Wright: I have no objection to counsel's statement.

Trial Examiner Norwood: Any further statements?

Mr. Wright: May we go off the record?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Mr. Wright: It is stipulated and agreed by and between counsel herein, that, subject to the approval of the Commission, the requirements of Rule 20 (A) and (B) of the Rules of Practice of the Federal Trade Commission to the contrary notwithstanding, motions for reconsideration and reversal of rulings of the trial examiner admitting or excluding testimony or evidence, and appeals to the Commission from such rulings shall be made to the Commission at the time of briefing and arguing the case to the Commission on the merits, and that no party shall be deemed

thereby to have waived any objection or any exception to such ruling or right to urge such objection or exception to the Commission at the time of argument on the merits. It is expressly understood that the purpose of this stipulation is to expedite the determination of this matter
4074 before the trial examiner and the Commission.

As I understand it, all of counsel who are here representing all of the respondents, except the respondent Glidden Company, are in agreement with that, and that we have word that counsel for Glidden is willing to go along with that, and that if he has any objection to it that he will let us know at some time during the hearing tomorrow, and that in the meantime other counsel will contact him for that purpose.

Is that understanding satisfactory to counsel?

Mr. Welch: Off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Mr. Wright: I am also advised that while counsel for the Anaconda and International is not objecting at this time to the stipulation, that he wishes to reserve his final decision on the matter until the hearing tomorrow.

Trial Examiner Norwood: No objection to that statement from counsel present?

Mr. Ewing: None at all.

Mr. Wright: Off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Mr. Wright: I will transmit a copy of the record with this statement to the Commission as soon as I return to Washington, pointing out that it is an agreement
4075 between counsel for the purpose of expediting the matter, and will request them to notify counsel whether or not the proposed procedure is acceptable.

Mr. DuBoise; Off the record.

(Discussion off the record.)

Mr. Welch: Mr. Examiner, I would like to offer in evidence Respondents' Exhibits 201, 202, 203, 204, which have previously been marked for identification. The offer here was delayed pending Mr. Wright's checking the identification, in view of the fact that the documents were originally identified as Commission's Exhibits for identification 554, 555, 556, and 557.

Mr. Wright: May I ask counsel where that ruling was made—off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Mr. Wright: Well, Your Honor, may I request a reservation of the ruling on that application until the first thing in the morning?

Trial Examiner Norwood: Yes.

Mr. Wright: May I have custody of these documents until morning?

Mr. Welch: Yes. I would like to have the following documents marked with the next succeeding respond-
4076 ents' numbers.

Trial Examiner Norwood: 218, is that right, Mr. DuBose?

Mr. DuBose: That is correct.

(The documents referred to were marked Respondents' Exhibits 218, 219, 220, 223, 224, 225, 226 and 227 for identification.)

Mr. Welch: Respondents' Exhibits 218 through 227 for identification are offered in evidence, and I will ask the Examiner to reserve the ruling until tomorrow morning, after Mr. Wright has had an opportunity to examine the documents.

Trial Examiner Norwood: The ruling is reserved.

Mr. Wright: I want to state for the record that I have requested counsel for the National Lead Company to produce original minutes books of the Executive Committee of the Board of Directors of the National Lead Company, and that by agreement I am going to read into the record a portion of those minutes which I understand counsel are willing to stipulate into the record with the same effect as if the secretary of the company were called as a witness and identified same.

Mr. Ewing: That is correct.

Mr. Wright: The minutes of meeting of the Executive Committee held December 7, 1933, Present: Messrs. Beale, Beschorman, Carter, Cornish, Rockwell, Sidford and
Thompson. The last paragraph of the minutes of
4077 that meeting is as follows:

"Resolved, that effective January 1, 1934, the price and terms of sale of dry white lead and basic lead sulphate in barrels be and they hereby are established as follows: In 20 ton lots, delivered either by rail in one shipment or by truck within three days in more than one shipment, dry white lead, 6½ cents per pound, basic lead sulphate, 6 cents

per pound; in less than 20 ton lots, dry white lead, 6¾ cents per pound, basic lead sulphate, 6¼ cents per pound; terms, 30 days net, with discount of 1 per cent for payment within ten days; all sales to conform to such uniform conditions of sale as may from time to time be established pursuant to Article II of the Supplementary Code of Fair Competition for Lead Pigments Division of Lead Industries Association" and that said minute is signed by M. D. Cole, Secretary.

Trial Examiner Norwood: Is that stipulated in evidence—is that it?

Mr. Ewing: That's right.

Trial Examiner Norwood: Anything further?

Mr. Ewing: No, sir. I move that we adjourn.

Trial Examiner Norwood: Does counsel wish to reconvene at 9:00 or 10:00 tomorrow morning?

Mr. DuBose: At 10:00 o'clock, I think, Your Honor.

Trial Examiner Norwood: Inasmuch as the witness Owens will not be here?

4078 Mr. DuBose: Yes, sir.

Trial Examiner Norwood: If he is expecting to be here, someone should notify him.

Mr. DuBose: I shall see him.

(Whereupon, at 4:00 p.m. the hearing was adjourned to November 14, 1947, at 10:00 a.m.)

4079 Trial Room No. 10,
Bar Association Building,
42 West 44th Street,
New York, N. Y.,
Friday, November 14, 1947.

Met, pursuant to adjournment, at 10:00 a.m.

Before:

John W. Norwood, Trial Examiner.

Appearances:

Joseph S. Wright, Esq., appearing for the Federal Trade Commission.

Edmund P. Wood, Esq., 2801 Carew Tower, Cincinnati, Ohio, appearing for Eagle-Picher Lead Company and Eagle-Picher Sales Company.

Robert H. Ecker, Esq., and
Henry E. Gardiner, Esq., (Chadbourne, Wallace, Parke & Whiteside, 25 Broadway, New York, N. Y.) appearing for Anacanda Copper Mining Company and International Smelting and Refining Company.

James D. Ewing, Esq., and
E. Z. DuBose, Esq., (Alexander & Green, 120 Broadway, New York, N. Y.), appearing for the National Lead Company.

4080 J. T. Welch, Esq., (Davies, Richberg, Beebe, Busick & Richardson, 815 Fifteenth Street, Northwest, Washington, D. C.), appearing for Sherwin Williams Company.

Roger Hinds, Esq., (165 Broadway, New York, N. Y.), appearing for The Glidden Company.

P. J. McDowell, Esq., Midland Building, Cleveland, Ohio, appearing for Sherwin Williams Company.

4081 PROCEEDINGS.

Trial Examiner Norwood: The hearing will come to order.

Pursuant to adjournment on yesterday, the hearing in Docket No. 5253 is reconvened in Room 10, Bar Association Building, at 42 West 44th Street, New York, N. Y., at 10:00 o'clock a.m., on November 14, 1947.

Please enter the appearances. Note that Mr. Worth Vaughan of general counsel for American Smelting and Refining is appearing especially today with us.

Call your witness.

Mr. Ewing: Mr. Brownell.

Whereupon,

FRANCIS HERBERT BROWNELL, a witness called on behalf of the respondent, after having been duly sworn, was examined and testified as follows:

Direct Examination by Mr. Ewing.

Q. Mr. Brownell, you are presently connected with American Smelting & Refining Company?

A. I am.

Q. In what capacity?

A. I am a director of—a director and chairman of the finance committee.

Q. Will you tell us when you first became con-
4082 nected with the American Smelting & Refining Company?

A. Back in 1912, I was then living in Seattle, Washington, and I then became counsel for the American Smelting & Refining Company in some of their western enterprises, and gradually took over the litigation or all of the legal affairs of the plants situate west of the Mississippi River.

Q. Subsequent to that time did you come to New York?

A. Late in 1916 I came to New York and became vice president and general counsel which I remained. In 1919 I was made chairman of the finance committee and began to take over executive functions. And in 1921 I gave up the general counselship entirely and even the name, and became first vice president, the second executive officer of the company. And I remained that until 1941, when Senator Guggenheim died, and I became head of the company until this last election last April, when I was eighty years old, and I retired.

Q. Prior to your retirement, when you say you were the head of the company, was your position chairman of the board?

A. Yes.

Q. Now, Mr. Brownell, we subpoenaed you to attend at this hearing, didn't we?

A. I beg your pardon?

Q. We subpoenaed you to attend this hearing?

A. Yes.

Q. I show you a photostatic copy of a document
4083 which is marked as Commission's Exhibit 93-A, dated February 26, 1906, and ask you whether you are familiar with it?

(Document handed to witness.)

A. Yes, I was at a later date. I was not at all familiar with the origin of the contract, which was before I was connected with the company. In 1921, at the time of its expiration, I had a great deal to do with it and had occasion to go over it very fully.

Q. At the time of its expiration in 1921, that you just referred to, was any attempt made to renew it?

A. Yes.

Q. And did you have anything to do with it at that time?

A. I had charge of that subject.

Q. Did you see anybody in National Lead Company in connection with it?

A. Yes, I saw the head of the company, Judge Cornish.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Mr. Ewing: That is Exhibit 93-A through I.

Trial Examiner Norwood: Just so we have that.

By Mr. Ewing:

Q. Was the contract renewed?

A. It was not.

Q. Was the failure to renew it due to Mr. Cornish?

A. Yes.

4084 Q. Do you know why he would not renew it?

A. For the reasons that he expressed to me at the time.

Q. Will you tell us what they were?

A. Judge Cornish said that necessarily the two companies would have to deal together because we were at the time—we had more lead for sale than any other company in the United States, and on the other hand, they claimed that they were the largest consumer of lead in the United States. He said, "There isn't enough lead to supply the National Lead's demands unless we buy from the A.S.&R.,

and there aren't enough consumers to use all of the A.S.&R. production unless the National Lead takes some of it. Necessarily we have to deal together."

Now, he, Judge Cornish, I should say, saw no reason why there should be the contract. On the other hand, he thought that the contract, while he had no particular criticism of the past contract, was perhaps at times stifling. He said, "We do not want to be"—we, the National Lead—"do not want to be bound by a certain amount from you to some extent, that handicaps our ability to buy perhaps at the lowest price, which is our ultimate objective, and on that account we feel that it is wiser for us not to be bound to take any specific amount."

I say, "We," I am indirect. I am saying to say what Judge Cornish said.

Trial Examiner Norwood: Yes.

4085 Mr. Ewing: Yes, we understand.

I ask that this photostat be marked Respondent's Exhibit 228.

(Document referred to was marked Respondent's Exhibit No. 228 for identification.)

By Mr. Ewing:

Q. I show you this photostat, Mr. Brownell, and ask you whether you executed the original on behalf of the American Smelting & Refining?

A. I did, and I had this photograph taken of it just the other day. That is my signature (indicating) and that is the agreement Judge Cornish and I formally agreed to execute at the conclusion of the contract in 1906.

Mr. Ewing: I offer Respondent's Exhibit 228 in evidence.

Mr. Wright: No objection.

Trial Examiner Norwood: Received as marked.

(RESPONDENT'S EXHIBIT NO. 228, previously marked for identification, was received in evidence.)

By Mr. Ewing:

Q. Since 1921, when the 1906 contract with National Lead terminated, has National Lead continued to purchase pig lead for American Smelting?

A. It has.

Q. Generally on what basis?

4086 A. Generally on what we call our sixty-day contract, also on what we call our average price contract.

The American Smelting & Refining Company will only sell lead to a delivery in the calendar month succeeding the date of the contract, because we must know what our tonnage is coming out of the refineries and what we will have available for delivery.

If National Lead made a contract, for example, on the first day of November, it might extend for delivery to the 31st day of December, but if they made a contract on the 30th day of November, likewise, it would have to expire on the 31st day of December. The delivery cannot exceed 30 days and may go as high as 60 days, depending upon the date of the contract in the calendar month.

The average price contract is a contract that is made for delivery within the same period, but it is not based on a specific price like the individual contract which specifies a given price of the lead. The average price would be the average of the A. S. & R.'s quotation for lead during the month in which the delivery is to be made.

Q. I show you a document which has been marked Commission's Exhibit 113 in evidence and ask you if that is an average contract of the kind that you have referred to?

(Document handed to witness.)

A. Yes, this is the average price contract.

Q. Will you tell us, Mr. Brownell, whether to your 4087 knowledge any official of the National ever attempted to influence American Smelting & Refining in setting its pig lead prices?

A. Yes and no. The National Lead Company's man who has charge of their buying comes to our man who has charge of the selling, and he always tried to get as low a price as he could for his lead—naturally—the usual buyer-seller relationship. So far as any official of the National Lead Company coming to me at any time or to any other officer of the company that I know of to speak of the general price of lead, irrespective of a particular individual contract, no. That has never happened.

Q. That is what I had in mind, the general price of lead.

A. No.

Trial Examiner Norwood: Those were bargaining agreements?

The Witness: I beg your pardon?

Trial Examiner Norwood: They were bargaining agreements?

The Witness: Bargaining agreements on individual contracts.

By Mr. Ewing:

Q. American Smelting & Refining publishes its lead quotations?

A. Yes.

Q. And those quotations are fixed by American Smelting & Refining?

A. Yes.

4088-A Q. And if I understood your prior answer with respect to those quotations, no National official attempted ever to influence any American Smelting official?

A. No.

Q. Will you tell us how American Smelting & Refining establishes its quotations on lead?

A. Most of the lead which the American Smelting & Refining has of United States origin is purchased lead, it is purchased in the form of ore or concentrates from the mines. Perhaps approximately 80 to 90 per cent of our lead originates in that way. Now, each day we publish a quotation on which we buy, and that is the price on which we sell on the same day. So far as it is humanly possible, and it is not of course practically impossible, we try to sell every day what we buy that day.

Trial Examiner Norwood: You don't buy the pig lead in its finished form, do you?

The Witness: No.

Trial Examiner Norwood: In the ore?

The Witness: In the ore and in the concentrates and consolidated concentration of ore that arrives at the smelter in carload lots, as a rule. And then a sample is assayed, and the lead content and the content of other metals, if any, are ascertained, and we pay the miner for the lead as soon as the assays are completed, on the price of the day

4088-B of the arrival or the day of the agreement on assaying, whichever the contract may happen to provide.

Now, in the case of lead, it takes approximately 60 days between the time of arrival of the ores and concentrates at a smelter and the time that we have it smelted and the product of the smelter refined and actually available for sale in commercial form. The price may vary during all that time, in that 60 days, and that is why we try to sell every day what we buy that day.

In order to be able to do so, we accumulate or did ac-

cumulate and have on hand constantly a source of lead or an amount of lead equal to that which is normally in process for this 60-day period. It is a reservoir, and we try to sell at the outgoing end of that reservoir every day an amount of lead equal to what comes in at the incoming end.

We are in a sort of dual position. We are trustee for the miner, in a sense, in getting the highest price that we can for his lead; on the other hand, we have to properly represent the market. And that is the object of our quotation.

Mr. Ewing: I have no further questions.

Cross-Examination by Mr. Wright.

Q. These two types of contracts that were mentioned, Mr. Brownell, the fixed-price contract—

4089 A. Yes.

Q. —is that the price of the prevailing spot quotation on the date on which the contract is entered into?

A. As a rule, yes. I think uniformly on a specific contract.

Q. By that contract, then, you undertake to supply lead, under the contract, at that spot price during the period it is in force?

A. No. Maybe I don't understand you. There are two types of contracts, the average-price contract, which is for a specific tonnage of lead, a thousand tons, 500 tons, 2,000 tons, whatever it may be, to be delivered during a given month and to be paid for at the average price of lead for the month of the delivery, based on the A.S.&R. quotation for lead for that month; now, the other contract is for, say, 500 tons or 100 tons, as the case may be, at, we will say, 6½ cents, or today, 15 cents per pound. It is the price on the day of the agreement.

Q. That is really a spot transaction?

A. A spot transaction except that the delivery is 30 days in the next succeeding month.

Q. But it could cover the same tonnage, a large tonnage, to be delivered at various times over the succeeding—

A. Yes, that could be done, too.

Q. Now, on this average price in the contract, how is the average price calculated; is that simply an arith-

4090 metical division of the quotations during the month?

A. Yes. There are 25 business days. The price of lead on each one of those days that there are in that month

—if there are 25, it would be divided by 25, and that would give the average.

Q. You spoke of the American Smelting & Refining Company being one of the largest sellers of lead. Approximately, Mr. Brownell, in 1941, when you retired, what was the percentage position of the smelting company on its refining capacity in the United States?

A. Well, the largest mine production of lead during this entire period of which we are speaking, since 1921, has been that of St. Joseph Lead Company. That is the biggest individual mine. I imagine the Bunker Hill—I haven't looked it up to be accurate, but my impression would be that the Bunker Hill is about the second mine. The intake of lead of the A. S. & R. is that of almost all the other mines. Not Eagle-Picher; they have their own smelter. Bunker Hill has its smelter. We have smelters, lead smelters, at East Helena, at Selby, which is on San Francisco Bay, at El Paso, Texas; at Leadville, Colorado; at Murray, Utah; and at Federal, which is in East St. Louis, near Alton, I believe within the limits of Alton in Illinois. We have those bed smelters. And their tonnage takes in the tonnage, oh, I presume, of four or five hundred little mines scattered
4091 all around, no one of which amounts to very much.

Now, the total output of the American Smelting & Refining, and this will be confined at the moment to the United States production, and excluding any foreign production, because we handle almost as much foreign, and at times more foreign, production than we do with United States production. The United States production in 1921, I think, our production, total production, was in excess of St. Joe, except very seldom, once in a while, they might exceed us, where a strike had occurred or some incident had occurred to reduce the production of a certain group of large mines.

Today it is in and out. For about, I think, about three or four months St. Joe production is ahead of our production. More of the time our production is ahead of theirs. It is pretty nearly even.

Q. When you add your domestic smelting and refining capacity to your processing of foreign ores and concentrated—

A. We are way up above—we would have, taking our world production—we have smelters in Mexico as well as in the United States, and taking our world production we

are the largest producer of lead in the world, individual producer of lead in the world.

Trial Examiner Norwood: Would you estimate the percentage of world lead which American Smelting handles?

The Witness: I would hesitate to make a state-
4092 ment of percentage. I can send you the percentage. I happened, in another connection, to look up our percentage of lead for 1932-1940, not so long ago, but I am a little hazy on the percentages, and I wouldn't dare state the percentages.

By Mr. Wright:

Q. Mr. Brownell, do the so-called lead pigments—now, that would be white lead, both the sulphate and carbonate, red lead, litharge, and the battery oxides, do they account for a substantial portion of the lead consumption in the United States?

A. Yes, they do still. They used to do so much more than at the present time. At the present time, white lead, for example, has been very greatly reduced, largely because during the war the Government restricted the use of white lead.

You see, during the war, from 1942, shortly after some time in the spring or the summer of 1942, as soon as we got going, until some time in the spring of 1946, we had nothing to do about where we sold at all, and for that matter we had nothing to say about the price, in this sense, that there was a ceiling placed on the price. The demand would have paid for double the ceiling very easily, but we all sold at the ceiling, and the Government told us whom to sell to. They issued allocation certificates to National Lead and to the other defendants here, and we had to supply them. We had nothing to say about it.

4093 Q. In the period up to 1941, just prior to the war, wasn't there an increasing consumption, particularly on the battery oxides?

A. Yes.

Q. Due to the development of the automobile industry?

A. Yes, and the internal combustion engine generally.

Mr. Wright: I have no further examination.

Mr. Ewing: Nothing further.

Trial Examiner Norwood: What is your best estimate about the world percentage there during the years you mentioned?

The Witness: Well, of course, the world percentage varies in any given year. I should say that we produced somewhere between 30 and 40 percent of the total world production.

Trial Examiner Norwood: Thank you.

Any further question?

Mr. Ewing: No further questions.

Trial Examiner Norwood: Thank you, Mr. Brownell.

(Witness excused.)

Mr. Ewing: May we have a short recess?

Trial Examiner Norwood: All right; a five-minute recess.

(A short recess was taken.)

Mr. DuBose: Please mark these for identification.

(Documents referred to marked Respondent's Ex-
4094 hibits Nos. 229-305, A to D, for identification.)

Mr. DuBose: Mark these.

Trial Examiner Norwood: All right.

(Documents referred to marked Respondent's Exhibits Nos. 306-A and B, 307-A and B, and 308-A, B, and C, for identification.)

Mr. Wright: Now, that is Commission's Exhibit 864 and 865-A, B, C, D, and E.

Trial Examiner Norwood: All right, A through E.

Mr. Wright: Yes, sir.

(Documents referred to marked Commission's Exhibits Nos. 864 and 865 A through E for identification.)

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Mr. Ewing: With respect to the stipulation read into the record yesterday relating to Rule 20, Mr. Hinds has advised me that that stipulation is satisfactory to him, and I understand that Mr. Gardiner finds it satisfactory to him, so that that is clear.

Trial Examiner Norwood: Mr. Gardiner is present?

Mr. Gardiner: Yes, your Honor.

Off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Mr. Ewing: By agreement among counsel, I now
4095 offer in evidence Respondent's Exhibits 306-A and B, 307-A and B, 308-A, B, and C, which will be identified more fully in a stipulation which will shortly be read into the record.

Mr. Wright: No objection.

Trial Examiner Norwood: Received.

(Documents referred to, previously marked for identification, were received in evidence as RESPONDENT'S EXHIBITS NOS. 306-A and B, 307-A and B, 308-A, B, and C.)

Mr. Wright: Your Honor, I want to offer in evidence Commission's Exhibits Nos. 864 and 865-A through E, by agreement of counsel, which documents will likewise be further described in the ensuing stipulation.

Trial Examiner Norwood: They are received.

(Documents referred to, previously marked for identification, were received in evidence as COMMISSION'S EXHIBITS NOS. 864 and 865, A through E.)

Mr. Wright: Now, I want to read into the record an agreed statement that has been worked out by counsel as follows:

It is hereby stipulated and agreed that if a representative of the Department of Purchases of the City of Cincinnati were called to testify, he would testify that for the years 1932 to 1944, inclusive, bids were received by that Department for basic carbonate white lead for purchase by the City of Cincinnati as set forth in the document marked as Commission's Exhibit 864.

4096 It is further stipulated and agreed that if a representative from the Milwaukee Board of Purchases were called to testify, he would testify that bids were made to the City of Milwaukee, Wisconsin, for purchases by the City of Milwaukee of white lead in oil as set forth in the document marked as Commission's Exhibit 865-A through E.

It is further stipulated and agreed that if a representative from the United States Treasury Department, United States Navy Department, and the Panama Canal Zone were called to testify, they would testify that during the years 1939, 1940, and 1941 bids were made as set forth in Respondent's Exhibit 306-A and B, 307-A and B, and 308-A, B, and C.

It is further stipulated that, as they may appear in said exhibits, the name Mammolith is a trade name of the Respondent Glidden Company; J. Lucas & Company is owned by the Sherwin Williams Company; the letters E-P, capital letters in quotes refer to Respondent Eagle-Picher Company; the letters S-W, capital letters in quotes, refer to respondent Sherwin Williams Company; that Hammar

refers to a brand name of the Respondent Eagle-Picher Company; and that Acme White Lead and Color Works is owned by Respondent Sherwin Williams Company.

The City of Cincinnati, referred to above, is the City of Cincinnati, Ohio.

Now, is it my understanding that all counsel are
4097 agreed on that matter as has been stated?

Mr. Ewing: That is correct.

Mr. Wright: I understand, Mr. Ewing, that you cleared this matter with Mr. Hinds?

Mr. Ewing: I am authorized to represent him on that matter.

Trial Examiner Norwood: Any disagreement on that among counsel?

There are none; proceed.

May we take up this matter of those exhibits on which the ruling was deferred until today, or such of them as counsel are prepared—

Mr. Ewing: That refers to the reserved rulings that were made yesterday—

Trial Examiner Norwood: Are you prepared to take a position on them, 201 through 227?

Mr. Welch: No, sir, it is not inclusive. It is 201 through 204, inclusive.

Trial Examiner Norwood: Yes.

Mr. Welch: And then 218 through 227.

Trial Examiner Norwood: Let's take those.

Mr. Wright: I want to state, your Honor, that all of these papers offered to be copies of documents which were submitted to the Commission under subpoena duces tecum by the National Lead Company in the very
4098 early stages of this proceeding and were given identification numbers at the time to keep the documents which were brought in under that subpoena, the many documents, in order. They obviously have no relevance to any issue in the case. They are, practically all of them, inter-office communications between the main office and the various branches of the National Lead Company about matters of purely internal policy, as to whether a particular freight rate was involved, and billing for the company's transportation of white lead to itself at another town, as I understand the transaction, which can have absolutely nothing to do with the question of price fixing or with the question of discrimination.

Now, the series of exhibits running from 218 through 227 are in that category.

Mr. Welch: Mr. Wright, may I ask you a question. Are you correct in your statement that the billing is from National to National? They are sales by National to Sherwin Williams, as I understand it.

Mr. Wright: Well, I was referring to exhibits 218 through 222.

Mr. Welch: Yes.

Mr. Wright: There are two separate series of papers which refer to whether or not the proper freight rates in shipping dry white lead to Dallas was the maxi-
4099 mum carload rate of 77 cents a hundred or the minimum rate of 64 cents per hundred and whether or not there was any claim involved with the Railroad if the wrong rate had been paid. And that is something that has absolutely nothing to do with the case or with any conceivable issue in the case.

Trial Examiner Norwood: They are respondent's Exhibits 201 through 204?

Mr. Wright: Yes, 201 through 204 are inter-branch correspondence between the Chicago branch of the National Lead Company and the Pacific Coast branch of the National Lead Company and the home office.

Trial Examiner Norwood: Yes?

Mr. Wright: Relating in the period—in the first quarter of 1942, at a time when, I might remind your Honor, when we were at war and ceilings had been imposed and normal conditions no longer prevailed in this business, as the record shows, and as to whether or not they were going to sell Sherwin Williams some white lead. There is a spot in here as to what the Sherwin Williams plans might have been as to merchandising.

What relevance does that have? It does not go to any issue in the case.

Trial Examiner Norwood: Does counsel object to the receipt of these documents in evidence?

Mr. Wright: Yes, that was the meaning of my
4100 statement.

Trial Examiner Norwood: I will ask Mr. Welch to take up 201 through 204 and give us his position on it and the purpose for which they are offered. I think he stated that heretofore.

Mr. Welch: I think I have; and I will try to be as brief as possible.

We have been charged with conspiracy. This correspondence shows that Sherwin Williams attempted to obtain some white lead in oil from National and that National had a series of letters between the Chicago branch office and the main office and decided not to sell Sherwin Williams the lead, and gave their reason for it. I would like to state that off the record because I don't think it is fair to put it on the record unless you admit the exhibits.

Trial Examiner Norwood: I will look at the exhibits.

Mr. Wright: I would like to remind your Honor of the date of the correspondence as to whether or not it is pertinent to this matter.

Mr. Welch: Your Honor, I think that a statement of that character by that organization as to what their attitude was toward Sherwin Williams has some weight and some bearing on the question of conspiracy between the two companies, and that is the purpose for which the documents are offered.

Trial Examiner Norwood: It shows their com-
4101 petitive attitude?

Yes, I think that I shall overrule the objection and receive them.

Mr. Welch: 201 to 204 inclusive.

Trial Examiner Norwood: That's right, received, Respondent's Exhibits 201 through 204.

(Documents referred to, previously marked for identification, were received in evidence as RESPONDENT'S EXHIBITS NOS. 201 through 204.)

Mr. Welch: Now, then with respect to Respondent's Exhibits 218 through 227, inclusive, contrary to Mr. Wright's statement, this involves purchases of lead, dry white lead, by Sherwin Williams from National Lead Company and the controversy between the two over the right freight rate and the amount that was to be charged Sherwin Williams in connection therewith.

Mr. Wright: Where does it say that in the exhibits?

Mr. Welch: Right here (indicating).

Now, your Honor, this, as I said before, concerns the discussion between Sherwin Williams and the National Lead on the question of the applicability of a freight rate. As a matter of fact, the wrong freight rate had been applied, and National had paid the right rates, and the Sherwin Williams attempted to get some of the benefits of that, and National, in effect, states, "Nothing doing."

4102 Mr. Wright: I object very strenuously to counsel's characterization of those exhibits into that effect.

Trial Examiner Norwood: Counsel's statements are not evidence.

Mr. Welch: We have been relying on that for some time.

Trial Examiner Norwood: Now, this reflects the attitude of one competitor to another here?

Mr. Wright: No, sir.

Mr. Welch: Your Honor, in that particular situation we were not competitors, Sherwin Williams was buying from National. In that particular instance it was seller and customer relationship, rather than a competitive one, at that level.

Mr. Wright: I assume from the correspondence that the price was a delivered price and that it was shipped freight collect, and for that reason an improper allowance had been made on the invoice for freight.

Mr. Welch: No, there was no allowance at all.

Trial Examiner Norwood: Does it show a more or less hostile attitude or just what?

(Discussion off the record.)

Trial Examiner Norwood: I will sustain the objection to the exhibits 218 through 227.

4103 Mr. Welch: Now, Mr. Wright, I would like for you to stipulate that on Commission's Exhibits 794-Z-9-Z-12 and 791-B-S, that the rates therein depicted are rail rates and not truck rates. Those are Commission's Exhibits.

Mr. Wright: I have never had this called to my attention before, so I am going to have to take a few minutes.

Mr. Welch: Let me make my proposal and you act on it when you are in Washington.

One other proposal: I propose to stipulate that Commission's Exhibit 791-E erroneously lists a city known as Richmond, Indiana, and that it should be Richmond, Virginia; the City of Richmond, Virginia, appearing on other exhibits under the same basic number, 791.

Mr. Wright: I will be very glad to take those matters up.

Mr. Welch: Mr. Lewis, will you take the stand, please?

Whereupon,

CARL M. LEWIS, called as a witness on behalf of the Respondent, having been duly sworn, was examined and testified as follows:

Direct Examination by Mr. Welch:

Q. Mr. Lewis, by whom are you employed?
A. Sherwin Williams Company.
Q. How long have you been employed by that concern?
4104 A. 28 years.
Q. In what capacity are you now employed?
A. Division sales manager.
Q. In what division?
A. In what is known as the Newark division.
Q. How long have you been division sales manager?
A. In Newark since 1936; and from 1932 to 1936 in Albany, New York.
Q. Is Albany a separate division from Newark?
A. Not at the present time.
Q. From 1932 until 1936 it was a different division.
A. Yes.
Q. Has it been consolidated with the Newark division?
A. Yes, sir.
Q. I show you the original of Sherwin Williams invoices No. 24769, No. 23595, No. 24768, No. 510, No. 521, and No. 509, all of which invoices are further identified on the tabulation now in evidence as Respondent's Exhibit 205-M.

Can you tell me who the purchaser is on each of those invoices?

(Documents handed to witness.)

A. Henry R. Ballinger, Poughkeepsie, New York.

Trial Examiner Norwood: Off the record, just a minute.

(Discussion off the record.)

4105 Trial Examiner Norwood: Proceed on the record.

By Mr. Welch:

Q. Mr. Lewis, will you continue your answer.

A. Henry R. Ballinger, Poughkeepsie again, Henry R. Ballinger, Poughkeepsie, again; Henry R. Ballinger, Hudson, New York; Henry R. Ballinger, Poughkeepsie; Henry R. Ballinger, Poughkeepsie; again.

Q. Now, Mr. Lewis, are you familiar with the general

freight policy of the Sherwin Williams Company with respect to less-than-carload shipments of lead pigments, such as dry white lead, white lead in oil, dry red led, red lead in oil, and litharge?

A. Yes.

Q. Can you state what that general freight policy has been on less-than-carload shipments?

A. The freight policy would be f.o.b. the factory, or equalization points.

Q. Now, do you use the term "equalization point" as synonymous with shipping point?

A. Yes.

Q. I show you Respondent's Exhibit 198-A through H, inclusive, or—are the cities listed on those exhibits cities that you would call shipping points?

A. Yes, most of them. Some of these I am not familiar with. But we would take them to be—

4106 Q. I am using this exhibit merely as an illustration, not of your particular branch.

A. Yes, these would be shipping points.

Q. And the cities that are listed as shipping points on whatever price cards are issued in your division—

A. That's correct.

Q. —are the points from which shipment ould be made?

A. That's correct.

Q. Or from the factory?

A. Yes, sir.

Q. And in either of those circumstances, what would be the freight policy on less-than-carload shipments?

A. Less than carload, the rate would be f.o.b. those shipping points.

Q. The invoices that I have referred to a moment ago, do they conform to that policy or do they differ from it?

A. Well, they differ.

Q. Will you explain why?

A. To meet competition of other lead companies.

Q. Will you explain that in detail, just exactly how that arose and what happened?

A. In the case of Henry R. Ballinger of Poughkeepsie—

Q. Just one moment. May I withdraw that question for a moment.

Are you personally familiar with that account?

4107 A. Yes, sir.

Q. Have you had direct dealings with that particular account yourself?

A. I established that account when I was traveling back territory in 1932.

Q. Now, will you make your explanation as to why?

A. In order to make Mr. Ballinger competitive with the other leading paint dealers in Poughkeepsie, we had to deliver white lead to his store.

Q. Is there any peculiar competitive situation in the paint business presently at Poughkeepsie?

A. Well, nothing different than in any other central community, a town of that size.

Q. In your answer when you said you had to deliver it for competitive reasons, do you mean deliver it free of freight?

A. That's right.

Q. And what was the condition that you met when you opened the account as to following your general policy of charging freight on less-than-carload shipments?

A. Well, you are speaking now in the case of white lead?

Q. This particular account on those particular lead pigments.

A. It was our competition. I was delivering to the key dealers, key paint dealers, in Poughkeepsie, and if Mr. Ballinger was to sell white lead in competition with
4108 these dealers, we had to deliver our white lead to him.

Q. That is, without freight cost?

A. Without freight cost.

Q. Now, I show you Sherwin Williams' invoices No. 43996, No. 44126, No. 44122, No. 44228, No. 44312, all of which invoices are abstracted on the tabulation which is now in evidence as Commission's Exhibit 205-F, and ask you if you can identify the purchaser listed on those invoices?

(Documents handed to witness.)

A. G. P. Barney, Watertown, New York; G. P. Barney, Watertown, New York; G. P. Barney, Watertown, New York; G. P. Barney, Watertown, New York; G. P. Barney.

Q. Are you personally familiar with that account?

A. Yes.

Q. How long have you been familiar with it?

A. Since about 1939 or 1940.

Q. Have you sold the account personally yourself?

A. No, I have not.
Q. Have you called on it personally?
A. I have called on the account.
Q. Do the invoices that I have asked you to examine conform to Sherwin Williams general freight policy for less-than-carload shipments?
A. No, there are exceptions here.
Q. Will you explain why those exceptions were made?
4109 A. For the reason that in Watertown, if Barney is to be in competition with the other large paint dealers in Watertown, we were compelled to allow him freight on white lead.
Q. That is, you make some concession on the freight delivery?
A. That's right.
Q. Do you know what competitive accounts there are in Watertown that he has to compete with?
A. I could name one or two.
Q. What brands do they handle, of lead pigment?
A. National Lead, Eagle-Picher.
Q. Is Watertown a particularly highly competitive city or not?
A. It is a shipping center and very competitive.
Q. Are there other accounts in Poughkeepsie where competitive brands are handled?
A. Yes, sir.
Q. Which one is particularly and primarily?
A. Well, E. V. Grant would be one.
Q. What competitive brands of lead pigments do they handle?
A. That would be National Lead, Eagle-Picher. They are the main ones.
Q. I now show you Sherwin Williams' invoices No. 25714, which is abstracted on Respondent's Exhibit 205-F, which is in evidence, and original invoices No. 10620,
4110 No. 9269, and No. 26649, which are abstracted on Respondent's Exhibit 205-G, and I will ask you if you can identify the purchaser on those invoices?
(Documents handed to witness.)
A. All of these are Putnam Hardware Company, Middletown, New York.
Q. Are you familiar with that account?
A. Yes, sir.

Q. How long have you been familiar with it?
A. I would say since—I may not be correct—but as I recall, since about 1939, 1940.
Q. Have you sold the account yourself?
A. Yes, sir.
Q. Are you familiar with the competitive situation in Middletown, New York?
A. Yes, sir.
Q. Will you state what it is?
A. It is the same as it is in any other trading center such as Poughkeepsie, Watertown, Newburgh.
Q. Are competitive lines aggressive or otherwise in that city?
A. Well, they are aggressive in that city and in all cities.
Q. Which accounts are particularly competitive there that you have to meet?
A. It would be National Lead Company mainly;
4111 Eagle-Picher in some instances.
Q. The last group of exhibits which I showed you as being the Putnam Hardware account at Middletown, New York, do the invoices that I showed you follow or deviate from the Sherwin Williams freight policy?
A. There are exceptions.
Q. And why were the exceptions made?
A. In order to place this account in a competitive condition with other established dealers.
Q. Can you identify the purchaser shown on Sherwin Williams invoice No. 3136, which is abstracted on Respondent's Exhibit 205-F?
A. Mohawk Wallpaper and Paint Company, Utica, New York.
Q. Does that invoice conform in so far as the freight policy is concerned as to Sherwin Williams general policy?
A. No, there is an exception there.
Q. Are you familiar with the account yourself?
A. Yes, sir.
Q. How long have you been familiar with it?
A. Since 1932.
Q. Have you sold the account yourself?
A. Yes, sir.
Q. Will you state why the exception to the general policy is made in selling this account?
A. In order to make that dealer competitive with
4112 the other paint dealers in Utica.

Q. Which are the principal competitive lines there that create this situation?

A. National Lead and Eagle-Picher, possibly others.

Q. Mr. Lewis, are you familiar with the containers, the 100 pound containers, 50 pound containers, 25 pound and 12½ pound containers in which white lead in oil and red lead in oil are sold?

A. Yes, sir.

Q. Are they the same or are they different?

A. They are the same.

Q. Now, if an invoice has no information on it with respect to how freight is to be handled, what is the policy and procedure followed?

A. We always—

Mr. Wright: I object to that, your Honor.

Mr. Welch: He is the division sales manager.

Mr. Wright: He is being asked to give a conclusion as to what it means when there is nothing on an invoice about how freight may be—

Mr. Welch: I said, what was the procedure followed.

Trial Examiner Norwood: He wants to know how they handle the transaction of which this invoice is evidence when the invoice does not have these particulars stated on it. I think he can show those particulars either by
4113 the invoice or by his own testimony.

Mr. Wright: Now, we don't have all of the invoices from which these documents were made in the record, but there has been a variance in policy; some of these invoices show freight prepaid; some of them show freight collect; and some of them don't show anything.

Mr. Welch: That is the only type I am asking him about, that is, the ones that don't show anything.

Mr. Wright: I appreciate that, but—

Trial Examiner Norwood: Just what was the transaction when it is an invoice like that?

Mr. Wright: He is asking about invoices that do not have anything about freight on them, what that means.

Trial Examiner Norwood: You can cross-examine on it. Objection overruled.

By Mr. Welch:

Q. If there is no notation on the invoice as to how the freight charge is to be handled, what procedure is followed?

A. In every instance, to my knowledge, they are f.o.b. the factory or the shipping point.

Mr. Welch: Just one second, your Honor.

That is all, your witness.

Trial Examiner Norwood: You may cross-examine, Mr. Wright.

4114 By Mr. Wright:

Q. When you spoke of carload shipments now, did you mean a railroad carload?

A. We speak of carload shipments as either a railroad car or a truckload, but the majority of them are truck, 20,000 pounds or over.

Q. Is 20,000 pounds a minimum truckload in your branch?

A. Yes, that's correct.

Q. No shipment of less than that quantity is handled as a truckload?

A. Yes, when the original order is not filled completely, then we consider it is not the fault of the customer and we do not penalize him by making him pay freight.

Q. In other words, even though it might only involve an actual shipment of 5 to 10,000 pounds, you don't add freight from the shipping point in that case?

A. That's right.

Q. When you spoke of carload you meant truckload as well as railroad carload?

A. That's right.

Q. Do I understand it to be your policy in the Newark branch to meet the competition where you find it of other sellers of white lead in oil in the method of handling freight charges to the customer; is that the substance of your testimony?

4115 A. Yes, I would say so.

Q. You are in the sales department, you testified I believe?

A. That's right.

Q. Do you make up the invoices in that connection, have anything to do with the making up of the invoices?

A. No, sir.

Q. Who handles that?

A. Our accounting department.

Q. As they process those invoices, they put various stamps and notations on them to indicate the steps that

have been taken in shipping and billing the customer, and so forth?

A. That's right.

Q. What then is the basis of your statement that in every instance where nothing appears as to how freight was handled that the thing was shipped with freight added from the shipping point?

A. Well, we usually,—we take the stand that for some reason or other that through probably a clerical error it was left off; usually they always show on an order.

Q. How freight was handled?

A. Yes. We always list it, but where it is left off, then the instructions are to make it f.o.b. the factory, and that is done.

Q. Is that a general office instruction?

A. That is the general rule that we follow, yes, sir.

4116 Q. Now, I show you on Invoice No. 24769, one of those you testified about, that the notation there "Shipped prepaid" is put on with a rubber stamp.

A. Well, this is a truckload order, sir, truckload order, and then that would be delivered shipped to destination. We would prepay the freight on it.

Mr. Wright: No further cross-examination.

Mr. Welch: Just about two or three questions, your Honor.

Trial Examiner Norwood: All right.

Redirect Examination by Mr. Welch.

Q. Mr. Lewis, in cross-examination, I believe, you stated it is your general policy in this division to state, even if it is going to be freight collect to so state on the invoice was that your answer to Mr. Wright?

A. That's correct.

Q. Do you know whether or not that applies in other divisions or only in your own division?

A. Only in my own division.

Q. That is all you know anything about?

A. That's right.

Q. And that rule that that be done in this division is a division rule and not a general executive office rule from Cleveland?

4117 A. I have never seen any. It is just a good business practice, to proceed that way.

Q. And that is the way you operate in this division generally?

A. That's correct.

Q. Now, you testified in answer to another question of Mr. Wright's that you attempted to meet competition; are there a number of cities in which Sherwin Williams has accounts and other companies such as National Lead Company, Glidden Company, and Eagle-Picher, also have accounts, but where you do not have to deviate from your general freight policy in order to continue selling your dealers?

A. Many towns of that nature. We only delivered that where we were forced to make important accounts competitive, particularly in the larger centers.

Q. And that would be approximately—that would be a very small number compared to the cities in which you did not have to make that concession?

A. That's correct.

Mr. Welch: That's all.

Recross-Examination by Mr. Wright.

Q. Will you list the towns where you do not deviate, where you sell any accounts of any particular importance, where you do not deviate from what you stated to 4118 be the general policy of handling freight.

Mr. Welch: Will you read that question, please?

(The question was read by the reporter.)

A. I wouldn't be able to name actual towns, but I do know that in many of the towns where white lead is not an important factor in that merchant's business—by that I mean there are not the number of painting contractors who usually take most of the white lead and create the competitive condition—a small dealer will order 100 pounds or 50 pounds or 25 or 12½, and that will be sold f.o.b. our factory or shipping point.

Q. In other words, that would not include towns where there was any substantial business in white lead in oil?

A. There might be exceptions.

Q. But as a general rule, that general policy then would apply only to the towns where there was a very small white lead in oil business?

A. Not necessarily. For example, we might take on a new account who had been buying his white lead from our

competitors and then he would look to us as a source, and if he told us that a competitor was delivering lead, then we would consider an exception in order to be competitive.

Q. Can you estimate for 1941 the percentage of white lead in oil of the total sales in the branch to which freight was added from shipping point?

4119 A. No, sir, I cannot.

Q. Would it be as much as five percent?

A. To which freight was added?

Q. Was added from the shipping point. In other words, excluding all your shipments of truckloads to shipping point, and to factory point, excluding all your split truckload orders where you couldn't deliver a full truckload, and excluding all those towns where you do meet competition as you say, and didn't add freight, what percentage would be the total of shipments to which freight was added, on white lead in oil.

A. I wouldn't be able to estimate that percentagewise. I would say the bulk of our white lead shipments were made to the larger trading centers.

Mr. Wright: No further questions.

Mr. Welch: Just one second, your Honor.

That's all.

Trial Examiner Norwood: Thank you, Mr. Lewis.

(Witness excused.)

Mr. Ewing: I suggest at this point that you call Mr. Warshow.

Mr. Wright: All right.

May we take a five-minute recess?

Trial Examiner Norwood: All right.

(A short recess was taken.)

4120 Mr. Wright: I am calling Mr. Warshow.

Whereupon,

HERMAN T. WARSHOW, was called as a witness on behalf of the Commission, having been duly sworn, was examined and testified as follows:

Mr. Wright: I am stating for the record that I am calling Mr. Warshow for the Commission. It is out of order, but I am trying to save time.

Direct Examination by Mr. Wright:

Q. Mr. Warshow, what is your present business?

A. I am vice president of the National Lead Company, one of the vice presidents.

Q. How long have you been in that capacity?

A. About 10 years.

Q. What was your position prior to that time?

A. Before that I was controller of the company.

Q. For how long a period of time?

A. Since 1921.

Q. Can you give us in general what your duties as controller were?

A. Well, they were the usual duties of the controller. I had charge of all accounting, tax work, renegotiation, the usual duties of a controller.

Q. Did you work closely with the president and 4121 the board of directors in your duties?

A. Yes, I did.

Mr. Warshow, were you well acquainted with Mr. E. J. Cornish?

A. Yes, I was.

Q. What was Mr. Cornish's position with the National Lead Company up until the time of his death?

A. Well, until somewhere in the 30's he was president, and after that he was chairman of the board until his death in 1938.

Q. All during the 20's and 30's he was president?

A. He was president. He didn't become chairman of the board until about somewhere in the early 30's, and he remained chairman of the board until his death in 1938.

Q. Do you recall discussing with Mr. Cornish and the other officers of the National Lead Company in the early 30's the matter of acquiring the Eagle-Picher Company?

A. Well, I don't recall very much about that. That is a long time ago. That would be when?

Q. 1930, 1931.

A. That would be about 17 years ago.

Q. Yes.

A. Well, I don't recall very much about that.

Q. Well, do you recall that there were discussions on that?

A. I read the other gentleman's testimony while
4122 I was waiting, and I refreshed my memory somewhat, but I don't recall very much about it.

Q. Well, do you recall now discussing with Mr. Cornish and the other officers of the company the matter of making an offer to the Eagle-Picher Company of a certain sum for the assets of the company during the early 1930's?

A. No, I don't.

Q. Do you recall attending a meeting in Washington in the Department of Justice with Mr. Cornish to discuss that matter?

A. I don't recall that at the moment. I'd have to look up my files. You see, I didn't know what you were going to require. I haven't made any preparation; I haven't looked up the files, or anything.

Q. Now, the matter of acquiring the Eagle-Picher Company would be a rather important matter, wouldn't it?

A. No, no, I don't think so. We have had a lot more important matters than that in the last fifteen years.

Q. In so far as capital expenditures?

A. Capital expenditures, acquisition of other companies, which involved a whole lot more money than the possible acquisition of Eagle-Picher. I say that with all due respect to the gentleman in front of me. It is a good-size company.

Q. Would you recognize Mr. Cornish's signature?

A. In those days the price of the stock was very low,
it was down to as low as $3 a share and they had
4123 about 900,000 shares, and that would have meant a total expenditure for the entire company of only $2,700,000.

Q. Would you recall the National Lead Company, through its president, stated that it was authorized by the board of directors to make an offer of $10,000,000 in May of 1931 to the board of the Eagle-Picher Company for the acquisition of the Eagle-Picher Company?

A. No, I don't recall anything of that kind.

Q. I show you a document and ask you to read it and ask you if it refreshes your recollection.

(Document handed to witness.)

A. All right.

Q. Does that document refresh your recollection about the proposal of the type that I was talking about?

Mr. Wood: Before answering, I would like to just once and for all state my position on the record, just to save my position.

Trial Examiner Norwood: Yes.

Mr. Wood: I therefore move that all of the testimony of this witness relating to whatever intentions National may have had with respect to Eagle-Picher be stricken, and I object to all further questions along that line. My reasons are two in number:

My first reason is that the complaint charges conspiracy between National and Eagle-Picher, and I cannot see
4124 that the monopolistic intentions of National are in any way binding upon Eagle-Picher or that Eagle-Picher is in any way involved.

My second point is this, and that is that anything—that in any case the testimony goes only to whether or not the National Lead Company has violated Section 2 of the Sherman Act, and not Section 1, but Section 2; and there has been no case so far that holds that the Federal Trade Commission has any jurisdiction whatsoever over cases that would be involved in Section 2 of the Sherman Act as distinguished from Section 1.

I won't interrupt again. I wish that objection to apply to all testimony along that line.

Trial Examiner Norwood: Well, don't you think I'd better reserve my ruling on that until after he has completed his testimony?

Mr. Wright: Already we have considerable testimony in the record about the stock holdings of the National Lead Company in Eagle-Picher Company, about the acquisition of various companies by the National Lead Company, and it is all very closely related to the allegations which appear in the complaint. As a matter of fact, I believe this is specifically alleged in the complaint.

Trial Examiner Norwood: Well, I will deny the motion for the time being. You may renew it when he has completed his testimony.

4125 What was the question?

(The question was read by the reporter.)

The Witness: Well, I can't say that I recall this.

By Mr. Wright:

Q. You don't recall the general subject that is covered in that document?

A. No, I don't. I recall the purchase of the stock, but I don't recall any offer as is indicated in this letter for the entire assets of the Eagle-Picher Lead Company.

Q. Can you identify the signature of Mr. E. J. Cornish?

A. It is rather difficult. I am not a handwriting expert. I wouldn't want to do that. I know his signature, yes. I have seen it a great many times. But I think it could be forged easily, and I would not know the difference.

Mr. Wright: May we go off the record for a few minutes?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Mr. Wright: May we go back to the record?

Trial Examiner Norwood: On the record.

Mr. Wright: No further questions of this witness.

Trial Examiner: Any cross-examination?

Mr. Ewing: None.

Trial Examiner Norwood: The witness is excused.

(Witness excused.)

Mr. Ewing: Off the record.

4126 Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Mr. Ewing: Mr. McCarthy.

Whereupon,

FRED K. McCARTHY, having been called as a witness on behalf of the respondent, previously sworn, testified further as follows:

Trial Examiner Norwood: He has been previously sworn.

Direct Examination by Mr. Ewing.

Q. Mr. McCarthy, I show you a number of documents which have been marked Respondent's Exhibits 229 to 305-D for identification and ask you to tell us what they are.

A. These are copies of telegrams sent by the general office of the National Lead Company in New York to

branch managers and others concerned in the company announcing changes in prices of pigments.

Q. Are they all telegrams?

A. In every instance that is a copy of a telegram.

Q. And from whose files are they produced, what office of National?

A. The office of Harold Roe, Vice president of the Company.

Q. When you say they were sent to various people concerned, does that include in some instances, wholly
4127 or partly-owned subsidiaries of National?

A. Yes, except on announcing changes on oxides; Morris P. Kirk and Evans and others would be concerned.

Mr. Ewing: I offer Respondent's Exhibits 229 through 305-D for identification in evidence.

Trial Examiner Norwood: Any objection?

Mr. Wright: I understand by agreement with Mr. Ewing, since I have not had an opportunity of examining this group of documents, that he will supply photostatic copies of them to me, and then I can reserve my objection until examining them some time next week. I will make every effort to hold it down so that we won't have to recall Mr. McCarthy for further examination.

Trial Examiner Norwood: We will consider the offer as pending.

Mr. Ewing: That concludes what we have to offer except for the matter of those exhibits just referred to and for Mr. Owens continued testimony next week; and with respect to that material I have to get up for Mr. Wright, my suggestion would be either Thursday or Friday, whichever is most convenient.

Mr. Wright: Either of those two dates is acceptable to me; whatever counsel finds convenient would be all right.

Before we close here, I want to discuss one matter Mr. Wood and I had pending.

4128-A Trial Examiner Norwood: You suggest that we adjourn until Thursday in Washington; is that it?

Mr. Ewing: Yes, sir.

Off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. Dubose: We don't want Mr. McCarthy any more, do we?

Mr. Wright: No, we don't.

Trial Examiner Norwood: Mr. McCarthy, you are dismissed.

(Witness excused.)

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Mr. Wright: I would like to make a statement for the record that Mr. Wood and I have discussed the means of settling certain points without the necessity of calling one of the officials of the Eagle-Picher Company, Mr. W. R. Dice, down here to testify, and we have agreed on the following statement, which replaces the testimony that Mr. Dice would give if he were called as a witness.

The agreement as to what Mr. Dice would testify if called as a witness is as follows:

4128-B It is hereby stipulated and agreed by and between counsel for the Commission and counsel for the respondent The Eagle-Picher Company and The Eagle-Picher Sales Company that, if W. R. Dice were called as a witness, he would testify:

That he is vice president and comtroller of The Eagle-Picher Company; that he has been connected with the company in various capacities for nineteen years and was executive vice president between 1937 and 1941, at which time Joel M. Bowlby became president of the Eagle-Picher Company; that he is and has been for many years last past familiar with the pricing policy of the company; that between January 1942 and the filing of the complaint herein, substantially all lead pigments were sold at substantially ceiling prices; that prior to January, 1942, and during the time he was executive vice president of the company, the company generally met prices quoted by the National Lead Company on all lead pigments made from pig lead including basic lead carbonate and lead oxides; that during this period the Eagle-Picher Company manufactured certain lead pigments, including blue lead, basic white lead sulphate and basic silicate white lead, directly from available ore concentrates mined by the company's subsidiaries; that the company made these latter products at less cost than it could make products functionally comparable from pig lead; that the prices set by the company on those latter products were determined by the company;

and that the Eagle-Picher Company's sales of basic
4129 white lead carbonate and basic white lead sulphate for the years 1937 through 1944, inclusive, are as follows:

Year	Sales Tonnages Basic White Lead Carbonate	Basic White Lead Sulphate
1937	4,533	7,348
1938	3,356	5,955
1939	3,246	5,315
1940	2,769	4,986
1941	5,163	8,066
1942	3,116	5,820
1943	3,113	3,889
1944	3,666	4,342

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: I want to put on the record here the request to the reporters that owing to the emergency here and our endeavors to close this case as soon as possible that the reporter is to be requested to prepare these exhibits and send them to Washington as soon as possible. I should like to have them to work with before Thursday, and certainly we want to have them there when counsel meet there, so we would appreciate it if they
4130 would make every possible effort to get these down promptly to Washington.

Mr. Wright: Now, as I understand the state of the record, we have finished all the presentation of evidence and all other matters except for the very limited subjects which were stated to have been pending here, including the subject of my examination of Mr. Warshow, Owens' testimony, and I think there were one or two matters yesterday where I asked for the right to notify you within the next week.

Mr. Ewing: That's right, and this last batch of exhibits that we offered.

Trial Examiner Norwood: I may state then that subject to the condition of some special testimony, that the taking of testimony in this case is closed.

Mr. Welch: No, sir, I don't think it is. You are actually going to take some more.

Mr. Wright: We may take some more Thursday. All I

wanted to point out is that we have reached the point where everything is cleaned up except some very limited matters.

Mr. Welch: But we have to keep the record open.

Mr. Wright: And we have to keep the record open for some testimony and for some exhibits.

Trial Examiner Norwood: I will reconsider that and say that we will probably close in Washington on our next hearing.

Mr. Wood: I wish to make it clear on the record 4131 that I do object to any statement offered by Mr. Ewing or otherwise put into the record with respect to the alleged attempt of National Lead Company to buy the Eagle-Picher Company. I will probably not be present in Washington next week, but I wish that objection on the record now to go to the whole subject matter.

Trial Examiner Norwood: Yes. Counsel may have that objection in case this matter is received, and I shall enter your objection.

Anything further?

Mr. Ewing: No, sir.

Trial Examiner Norwood: By request of counsel, in agreement, the hearing is now adjourned to reconvene in Washington, D. C., in the offices of the Federal Trade Commission at ten o'clock a.m. on next Thursday, November 20, 1947.

(Whereupon, at 12:45 p.m. the hearing in the foregoing matter was adjourned until Thursday, November 20, 1947, at ten a.m. in Washington, D. C.)

4132 Room 332
Federal Trade Commission Building
Washington, D. C.
Thursday, November 20, 1947

Met, pursuant to adjournment, at 10:00 a.m.

Before: John W. Norwood, Trial Examiner.

Appearances:

Joseph S. Wright, Esq., appearing for the Federal Trade Commission.

James D. Ewing, Esq., and
E. Z. DuBose, Esq., (Alexander & Green, 120 Broadway, New York, N. Y.) appearing for the National Lead Company.

J. T. Welch, Esq., (Davies, Richberg, Beebe, Busick & Richardson, 815 Fifteenth Street, Northwest, Washington, D. C.) appearing for Sherwin-Williams Company.

4133 PROCEEDINGS.

Trial Examiner Norwood: The hearing will now come to order.

Pursuant to adjournment in New York on November 14th, the hearing in Docket 5253 will now convene in Washington, D. C., in Room 332 of the Federal Trade Commission Office, at 10:00 o'clock a.m., on the 20th day of November, 1947.

Please note the appearances.

Call your witness.

Mr. DuBose: Mr. Owens.

Trial Examiner Norwood: Have you been sworn in this case, Mr. Owens?

Mr. Owens: Yes.

Trial Examiner Norwood: Mr. Owens is recalled for further examination.

THOMAS F. OWENS was thereupon recalled as a witness for the Respondents and, having been previously duly sworn, testified as follows:

Direct Examination by Mr. DuBose.

Q. Mr. Owens, I show you Respondents' Exhibit 215-A, which you identified last week in New York, and I call your attention to the 12th line from the top. Opposite "Weight in Pounds, 40,000; Selling Branch, New Orleans Warehouse," in the fifth column after the heading "Manu-
4134 facturing Branch," under the heading "L.C.L. Rate /Cwt." the figure is 1.05. Is that a correct figure?

A. No, sir, that figure should be 5 cents a hundred.

Q. Now, what does 5 cents a hundred represent there?

A. That is the trucking rate from New Orleans Warehouse to the customer.

Q. Now, I call your attention to the extensions in the columns following the column noted as "Customer's Location." Where the l.c.l. rate figures in that, is it at the rate of 1.05 or 5 cents?

A. The extension in Column 7 has been made at the rate of 5 cents a hundred.

Q. So that the 1.05 there is a typographical error; is that correct?

A. Yes, sir.

Q. Now, I note also, in the next to the last column opposite that same item, the l.c.l. rate 1.05. Is that a mistake, too?

A. No, sir, that is the freight from St. Louis Manufacturing Branch to New Orleans.

Q. In other words, that is the l.c.l. rate per hundred pounds direct from the St. Louis Manufacturing Branch to New Orleans?

A. Correct.

Q. I also call your attention to Respondents' Exhibit 215-A, to the 15th line from the top. Under the head-
4135 ing "Customer's Location" the town's name is spelled M-e-r-i-d-e-n, Mississippi. What should that be?

A. I believe that should be Meridian, Mississippi.

Q. Instead of Meriden, Mississippi?

A. That is correct.

Q. If that anywhere near Laurel, Mississippi, do you know?

A. No, sir, I do not.

Mr. DuBose: At this time, your Honor, I renew my offer of Respondents' Exhibits 215-A and B, 216, and 217 for identification.

Mr. Wright: I would like to request preliminary cross-examination on this, and I would like to state that I would like rather extensive preliminary cross before your Honor rules on these particular exhibits.

Trial Examiner Norwood: You may question him on anything going to the admissibility of the papers, identification.

Voir Dire Examination by Mr. Wright.

Q. Mr. Owens, will you tell us again now how you selected the transactions which appear on 215-A and 215-B.

A. You mean by that, the particular customer locations?

Q. The particular customer locations and the weight of the shipments.

A. From the records which we keep in the New
4136 York office, we know exactly how much dry lead is shipped to every customer throughout the United States. Therefore, in preparing the schedule we went to that record, and with the assistance of the head of the dry lead sales department, all the carload customers were selected.

Now, there is one exception to that statement, and that is that where the customer was located immediately adjacent to or within the immediate area of our manufacturing plant, those sales do not reflect on this statement.

Q. Those sales were omitted from the statement, in other words?

A. Yes, sir.

Q. Now, I call your attention to the tenth line up from the bottom of 215-A and B. Under "Customer's Location," there appears "St. Louis." The corresponding column for that transaction, "Selling Branch," is "St. Louis." There is an amount in the transaction of 702,000 pounds. The carload rate there is given as 16 cents a hundred. The less-than-carload rate appearing in the next to the last column on that transaction is 46 cents. How did you arrive at that?

A. I don't follow you on that. How did I arrive at what?

Q. At those rates that were applicable from St. Louis to St. Louis, as it appears.

Mr. DuBose: Just a moment. May I object to that question? It shows the manufacturing branch as 4137 Chicago, Mr. Wright.

Mr. Wright: Oh, I will withdraw that.

By Mr. Wright:

Q. Now, you went over the total figures, then, in 1941, of dry white lead, as I take it, and your grand total of pounds sold, over on 215-B in the first column, is 17,821,375 pounds. Now, with the exception of that one transaction from Chicago to St. Louis, all of those tonnages are at points not immediately adjacent to your factories. How does that total that you have entered here, 17,821,375, compare with your total dry white lead sales in that period?

A. It approximates 55 per cent.

Q. In other words, then, 45 per cent of your dry white lead sales were sold in and around the factories and not recorded on these exhibits?

A. Or in less-than-carload quantities.

Q. Well, how much of it is represented in less-than-carload quantities? Can you state that?

A. No, I don't have that figure. The combined figure would approximate 45 per cent.

Q. Well now, to give a complete picture of your transportation costs on all your white lead business during 1941, would it not have been necessary for you to record all of the transactions in this particular commodity, with the freight costs on all of those transactions?

4138 A. No, I don't think it was necessary. I think we have representative figures here.

Q. But this doesn't relate to your whole business of dry white lead. Your total freight cost that you get over here on 215-B is only a freight cost on carload shipments to other points than your factory points. It isn't representative of your whole business.

A. Well, I think you may have two questions in yours. In the first place, the total freight figures which we have here are not the total freight costs incurred during the year 1941.

Q. They are theoretical freight costs based on different types of freight rates, is that correct?

A. Correct. To the extent that we are dealing with actual weights and actual freight rates—

Q. But theoretical extensions in so far as they would represent actual shipping costs incurred.

A. As far as total cost is concerned, yes.

Q. Now, in making up these exhibits, the various rates which appear here, carload, l.c.l., are all rail freight rates, are they not?

A. Correct, with the exception of—

Q. Local cartage.

A. —local cartage.

Q. Right. Now, from your experience with the company, is it not a fact that a considerable portion of
4139 your tonnage of white lead, dry white lead, now, moves by truck?

A. A good portion of it does move by truck, and in making up these figures I have eliminated the trucking shipments, tried to eliminate the trucking shipments.

Q. To these points?

A. To these points, yes. The trucking shipments are the ones where the customer is located close to the manufacturing point.

Q. Well now, isn't it a fact that a truckload shipment will often take a rate equal to or approximately the same as the rail carload rate?

A. Frankly, I don't know. I stayed away from trucking rates.

Q. Now, in going through these customers, did you ascertain whether they were regularly shipped by rail as against truck?

A. Frankly, I didn't ascertain definitely that all these customers always took in rail shipments. However, when the traffic department was asked for the rates, which they supplied in this instance, they were to give us the rail rates, since in the great majority of cases the railroads would be used for that purpose.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

By Mr. Wright:

Q. Well now, let's look at a typical transaction here, Zanesville, Ohio, down in about line 22 or 23, where
4140 you show an l.c.l. rail rate from Cincinnati to Zanesville of 38 cents a hundred.

Trial Examiner Norwood: What sheet is that on?

Mr. Wright: On 215-A.

By Mr. Wright:

Q. You don't know, do you, whether or not the Cincinnati warehouse might service Zanesville, Ohio, on dry white by means of truckload shipments rather than l.c.l. rail shipments?

A. No, sir.

Q. I call your attention to the second transaction on 215-A. Palo Alto out of Melrose. That is within a few miles of Melrose, is it not, Palo Alto?

A. I don't know.

Mr. DuBose: You mean as the West goes, Mr. Wright?

Mr. Wright: No, I mean literally. It is common knowledge that Palo Alto is in the San Francisco Bay area, as is Melrose.

Trial Examiner Norwood: Wait a minute. Where is that Palo Alto transaction? Is that on the first sheet?

Mr. DuBose: It is on the second line, your Honor, of Respondents' Exhibit 215-A.

By Mr. Wright:

Q. Mr. Owens, since these are all carload customers, why did you list on this exhibit l.c.l. rates from warehouse to customer, and from manufacturing branch to customer?

4141 A. Why did I?

Q. Yes, sir.

A. It is my understanding that in some instances shipments may move in either way. It may be direct shipment to the selling branch, or the warehouse, carload quantities, and shipments from there to the customer in l.c.l. quantities, or it may be an l.c.l. shipment directly from the manufacturing branch to the customer.

Q. Then these aren't all carload shipments, then? They include l.c.l. shipments?

A. Yes, l.c.l. shipments from the warehouse or selling branch to the customer, or from the manufacturing branch to the customer, but the customers are the carload customers.

Q. Oh, you classify the customers as carload customers, then, rather than taking carload transactions; is that correct?

A. I fail to see the distinction between the two.

Q. Well, now, then as I take your testimony, these are customers who customarily purchase in carloads.

A. Correct.

Q. Who get the carload price.

A. Correct.

Q. But an undetermined amount of this tonnage may be shipped in less-than-carload quantities; is that correct?

A. 1941?

Q. Yes, sir.

4142 A. It is quite possible that part of it may have been shipped in l.c.l. quantities.

Q. Yet you didn't take the other customers, located perhaps in these same areas or in other consuming centers, who customarily purchase in l.c.l. quantities?

A. No, sir.

Q. Now, these end figures that you got by extending these theoretical rates in the three different fashions, then, are theoretical figures in so far as what the actual shipping costs of National Lead Company might have been on this product during 1941?

A. Correct.

Q. Turning now to Respondents' Exhibit 217, will you tell me what the item appearing opposite No. 17 in the first line, under the column 1939, represents?

A. You refer to $141,003.32?

Q. Yes.

A. Account 17 represents the salaries of the individuals working in the accounting department, credit department, as well as some of the salaries of the—it also takes the salary of the manager of the branch.

Q. Just those three categories?

A. No, it takes in any office salary.

Q. All office salary?

A. Yes.

4143 Q. Now, is that of the Atlantic Branch?

A. Only.

Q. Only?

A. Yes.

Q. Now, when you say all office salaries, do you mean now to exclude salesmen's salaries from that?

A. Yes, sir. They are contained in Account 20.

Q. That is the entire branch office expense, then?

A. Right.

Q. As far as salaries are concerned?

A. Yes. All branch salaries would be reflected in the account shown.

Q. Would that include the assistant manager of the branch, the comptroller of the branch?

A. When I say his salary is included in here, the sales manager's salary would show in "Salesmen's Salaries & Expense," but the figures which appear in Exhibit 217 include all the salaries of that particular branch.

Q. That would include the salaries of the branch in so far as they related to the administration of the productive facilities of the Atlantic Branch?

A. Well, the complete administration and selling efforts of the Atlantic Branch.

Q. Covering all their products?

A. All their products.

4144 Q. And all of their activities?

A. Correct.

Q. Then that would include the administrative overhead of the factory operation?

A. If by that question you mean the salaries of plant superintendents and other supervisory employees of the factory, the answer is no.

Q. In other words, this wouldn't include the salaries of people who were actually in the factory?

A. No, sir.

Q. But it would include the salaries of the officials of the branch who supervise the factory operations?

A. Correct.

Q. From the main office?

A. The men who supervise the administrative and selling functions.

Q. Of the—

A. —Atlantic Branch.

Q. That would include all the metallic products?

A. Correct.

Q. All of the oils?

A. Yes.

Q. All of the mixed paints?

A. Yes.

Q. All of the putty, solder, everything that is han-

4145 dled by the Atlantic Branch?

A. Correct.

Q. Now, the same is true, then, of all these other items which appear down here?

A. The same is true of all.

Q. The sales expense is likewise distributed all through the branch?

Mr. DuBose: Mr. Owens, will you answer verbally so that your answer may appear in the record, instead of nodding.

The Witness: Yes. What was the question?

Mr. Wright: Will you read the question.

(The pending question was read by the reporter.)

The Witness: Will you rephrase the question?

Mr. Wright: I will withdraw the question.

By Mr. Wright:

Q. Item No. 20, "Salesmen's Salaries & Expense"—those are sales of all branch products, throughout the branch?

A. That's right.

Q. Now, do you think, as an accounting proposition, that the end total, "Total Administrative & Selling Expense," represents the best accounting procedure actually to determine that item?

A. You are referring to the $565,000?

Q. Yes, sir.

A. Yes, sir, those are actual figures.

4146 Q. There are no items which are improperly included in there or which should, by proper accounting procedures, have been excluded?

A. Under our accounting setup, we feel that all these items of expenses are the ordinary expenses of doing business and properly included in any sort of a financial statement.

Q. Now, getting down to the next line below that, under the heading "Total Regular Number of Invoices Entered," will you tell us how you got that figure?

A. Atlantic Branch maintains a record of every invoice prepared. They keep a daily record of the number of invoices prepared, covering all of their sales. This figure was simply taken from their books for the three years of 1939, 1940, and 1941.

Q. Do you know what things are entered in that record? Now, do you include in that the billings to agents on consignments of white lead in oil?

A. If it represented a charge to the agent, material sold, it is considered here as an invoice.

Q. Well now, as I understand the state of the record, there are two different types of billings to an agent. One is the shipping memorandum, when goods are shipped to him. Another is a monthly report billing him for what he has sold. Now, are both those types of things entered in that invoice?

A. No, sir. Included in this figure is the monthly
4147 statement, as you put it, to the consignee, if there is a money value involved in the transaction.

Trial Examiner Norwood: A little louder, please.

By Mr. Wright:

Q. But in the case of a shipment, say, of dry white in 100-pound kegs, or red lead in oil, to one of your distributor accounts, those invoices would appear separately from the consignment billing?

A. They would be a separate invoice recorded for that transaction.

Q. Are you familiar with the breakdown, in point of numbers, of that figure of 76,238 regular number of invoices, as between your trade sales items and your industrial sales items, such as dry white lead in 600-pound kegs?

A. No, sir.

Trial Examiner Norwood: Now, I didn't understand clearly what you said. On invoices to the agents for the goods that they have reported sold in the month—do you give them an invoice based on the report, then?

The Witness: Yes, sir. When the material is shipped to the consignee, there is usually a memorandum billing, as we refer to it, issued to him. Then, he reports periodically, usually on a monthly basis, the amount of material which he sells. We then issue to him a bill for material sold. At that time we have an invoice entered.

4148 By Mr. Wright:

Q. Now, Mr. Owens, there may be several memoranda billings to an agent during a month on these products, white lead in oil, yet there will only be one agent's report every month; is that correct?

A. I believe so; yes.

Q. So that figure which you entered here in the 76,000 may not represent anywhere near the total number of memoranda billings reflecting actual shipments to agents?

A. Well, you are assuming that we sell all merchandise on consignment.

Q. I am talking now about the stuff you do sell on consignment, white lead in oil, or did sell during this period.

A. As far as I know, dry white lead was not sold on consignment.

Q. I am talking about white lead in oil, and I assume white lead in oil billings to the agent were included in this total of regular invoices.

A. That is correct.

Q. So that what was included as to your agents on white lead in oil might be a considerably smaller figure than the actual billing memoranda or shipping memoranda covering the shipments to the agents?

A. Well now, you are drawing a distinction between shipping memoranda and billing memoranda. I have
4149 used "Regular Number of Invoices Entered," and not attempted to ascertain the number of shipping memos that have been made.

Q. Well, what I am trying to get at is: Do you know whether use of the shipping memoranda, rather than the billing memoranda, would have increased this figure?

A. Probably would have; would have increased the number of invoice units.

Q. Yes.

A. If you consider them to be an invoice unit—

Q. Yes.

A. —the answer is yes.

Q. Now, is it not true that a good many invoices that might be represented in that figure of 76,000 would include several different products?

Mr. DuBose: Do you mean each invoice, Mr. Wright? Otherwise, I object on the ground the question is ambiguous.

Mr. Wright: Will you read the question, please.

(The pending question was read by the reporter.)

By Mr. Wright:

Q. I will amend the question and say: There are invoices represented in the 76,000 figure which cover more than one product on the same invoice?

A. Yes.

Q. About how many different products are offered in the trade sales department, do you know, customarily
4150 sold to the paint and hardware dealers?

A. By the Atlantic Branch?

Q. Yes, sir.

A. White lead in oil, linseed oils—

Q. Different types and kinds of linseed oils, is that not true?

A. Right. Various types of white lead; colors in oil, miscellaneous painted products. That would about take care of all the materials sold to a paint store or hardware dealer.

Q. But there probably would be in excess of 20 different items, taking the various grades and kinds of things offered to the trade?

A. Yes, sir.

Q. All or any part of that might appear on a single invoice; is that not true?

A. Correct.

Q. Now, on 216, as I understand it, you lumped together the combined administrative and selling expense of the whole branch and divided it by the number of invoices, and came out with that figure under "Cost per Invoice—Average;" is that correct?

A. That is correct.

Q. Simple arithmetical averages of those figures?

A. Yes, sir.

Q. Do you consider that that has any relation to
4151 the actual cost as regards dry white lead sold in 600-pound kegs, the invoice cost or selling expense?

A. The selling expenses are the actual selling expenses, divided by the number of invoices of all products, giving us the average cost per invoice.

Q. Well now, if you divided the number of chairs in the board of directors' room by the combined administrative and selling expenses, that would have, by the same token, given you the cost of each chair in the board of directors' room.

Mr. Ewing: I object to that as purely argumentative.

Mr. Wright: I submit, your Honor, that is perfectly proper cross-examination.

Mr. Ewing: It is the most ridiculous question.

Mr. Wright: I am trying to get out of this witness what that figure $7.42 means.

Trial Examiner Norwood: I think that is merely argument there. Objection sustained.

Mr. Wright: May we have a short recess for a moment, your Honor?

Trial Examiner Norwood: We will take a five minute recess.

(A short recess was taken.)

Trial Examiner Norwood: Proceed.

By Mr. Wright:

Q. Mr. Owens, is it not possible to determine ac-
4152 curately by recognized accounting procedures, the actual administrative and selling expense which can be properly attributed to the product dry white lead in 600-pound kegs in the Atlantic Branch?

A. No, sir, I don't think you can do that and arrive at an answer which you can say is perfectly accurate. There are too many accounting factors which require arbitrary distribution.

Q. Well now, are there not recognized, standard arbitrary distributions of cost as between different products?

A. You mean from an administrative and selling angle?

Q. Yes, sir.

A. I don't know of any methods of distribution. Each company usually arrives at their own which they feel are fair, reasonable.

Q. Well now, as to the product dry white lead, has the National Lead Company not made accounting and cost surveys to determine their administrative and selling expenses, from actual records, on the product dry white lead?

A. No, sir, we couldn't do it, and there is no accounting technique that would enable us to do it.

Trial Examiner Norwood: Would an invoice for dry white lead and lead in oil cost any more if made out by your company than an invoice for other things which they sell?

The Witness: No, sir, there is no reason why one should cost more than the other.

Mr. Wright: Would you read that question and
4153 answer, please.

(The question and answer referred to were read by the reporter.)

By Mr. Wright:

Q. During the period of the Office of Price Administration, didn't the National Lead Company keep what they considered to be accurate cost records as to the various different products which they produced and sold?

A. Manufacturing costs, yes. Selling and administrative expenses are a matter of distribution.

Q. Well, didn't they, during that period, distribute selling and administrative costs as between the various products?

A. Yes.

Q. They did?

A. Yes.

Q. In other words, then, you have kept such records.

A. That is correct.

Q. Which allocate, as to the different products, all of your costs, selling, administrative, production, transportation?

A. Yes.

Q. And overhead; all the various different things.

A. Yes, sir.

Q. So that those records would show exactly what portion of these costs are attributed to each different product?

A. On our basic distribution, yes, sir.

4154 Q. I assume, now, that that basis of distribution would be to take an arbitrary part of the branch salaries and the administrative officers', and allocate that part to that product on the basis, either of the dollar volume sold in relation to the total dollar volume, or some other basis of that sort.

A. Briefly, wherever possible, it would be a direct distribution of the product. In other instances, where you could not distribute directly, it would be on a fair and reasonable arbitrary basis.

Q. Now, do you keep such records in the regular course of business?

A. Yes, we do.

Q. For tax purposes? For other purposes?

A. I don't know for tax purposes, but we do keep those records.

Q. But that is an entirely different type of record than this represented by the combination of three exhibits, 215, 216, and 217?

A. Yes, but for the fact that the total selling and administrative expense as shown on Exhibit 216 would agree with it.

Q. With the combined total of everything?

A. Correct.

Q. Including metallic lead products and linseed oil and mixed paint and those things?

A. Correct.

4155 Q. Do you keep such records by customer classes or trade classes?

A. I don't believe we keep them by customer classes. We keep them by product classes.

Q. Product classes?

A. Yes.

Mr. Wright: No further preliminary cross.

Trial Examiner Norwood: I understand that the exhibit is offered now.

Mr. Wright: Well, it was offered previously.

Mr. DuBose: I just want to ask one or two questions and I will re-offer it.

Trial Examiner Norwood: Yes.

Direct Examination (Continued) by Mr. DuBose.

Q. The figure appearing opposite the words "Cost per Invoice-Avg" on Respondents' Exhibit 216 for identification represents the cost per invoice regardless of the product; is that correct?

A. Correct.

Q. Now, will you tell us, if you know, how an invoice is processed in the Atlantic Branch? What steps do you go through?

A. Upon the receipt of the order, a form is typed up and prepared, which is then routed to the credit department for credit rating. After approval by the credit department, the order will be passed along for entry on

4156 the company records, and notices will be sent to the plants to prepare for shipment. The invoice is then billed after shipment, recorded in the accounts receivable department, turned over to the mailing department for mailing purposes, and then, at this point, the accounting department begins its distribution and the preparation of sales statistics.

Q. So all in all, it goes through seven or eight departments; is that correct?

A. At least.

Mr. DuBose: I now re-offer Respondents' Exhibits 215-A and B, 216, and 217 for identification.

Mr. Wright: I would like to ask two more questions here on this matter now.

Trial Examiner Norwood: All right.

Voir Dire Examination (Continued) by Mr. Wright.

Q. This averages out, then, all of the credit expense on a per invoice basis, whether that credit expense relates to white lead in oil, linseed oil, colors in oil, or mixed paint; is that correct?

A. Are you referring to Account 27?

Q. Yes, sir.

A. Yes, it does.

Q. Based on your experience as an accountant now, and with the company, would you say that the credit ex-
4157 penses properly allocable to dry white lead in 600-pound kegs, sold to industrial customers for their own use, would be as much as the credit expenses properly allocable to trade sales to dealers and others for resale?

A. Frankly, that is a difficult question to answer, but I will do my best on it.

You draw the distinction between industrial sales and trade sales. Now, to begin with, you have a great difference between the quantities involved, but on a proportionate basis, I know of no reason why the loss on one should not be the same as the other.

Q. Well, now, would your expense of investigation, which I assume is a part of your credit expense that appears in here—

A. Yes, sir.

Q. Would that be as much in selling to people buying in five and twenty-ton quantities for their own consumption and use in manufacturing processes as similar credit investigations of small hardware stores and paint dealers?

Mr. DuBose: I object on the grounds that the question is ambiguous. Do you mean, Mr. Wright, per pound or per customer?

Mr. Wright: I am talking about per customer.

Trial Examiner Norwood: Answer the question.

The Witness: Will you read that back?

(The pending question was read by the reporter.)

4158 The Witness: I am still not sure I understand the question, but as far as an order coming through and going through the credit department, one for a 600-pound item of dry lead would probably take just as much time and effort as one for 20 tons of dry lead. Is that your question?

By Mr. Wright:

Q. No. I am speaking now of the comparison of the cost per customer of credit investigations of the purchasers of dry white lead in 600-pound barrels in varying quantities, as against the credit investigation of your trade customers, namely your small paint stores and hardware stores who buy white lead in oil and similar products for resale.

A. You see, the problem there is you may well spend more time looking up one individual paint store customer than you would looking up credit rating on a large outfit, and once you have ascertained the credit rating on a large outfit, from that point on it is not necessary to go through that same procedure.

Q. Isn't it true, now, that most large industrial consumers are listed in Dun & Bradstreet and the other reports, with a very good credit rating, so that you, once you have looked at it, don't need to keep referring to it and make investigations of it? Isn't that an accurate statement?

A. That's right.

Q. Now, is that true with your small trade sales customers?

A. Many of those people are also listed in Dun &
4159 Bradstreet. Upon receipt of their first order, we would have to investigate their credit rating. From that point on, our experience would help us out in issuing credit to them.

Q. But with relation to these small customers, wouldn't it be fair to assume that your credit investigation would have to be on a more continuous basis than it would with your large industrial customers?

A. If it is a risky customer, yes; if it is a good small customer, no.

Q. Now, small customers not listed in Dun & Bradstreet—isn't there more expense in making an investigation than there is with your large industrials who are so listed?

A. I understand that many of the small customers are listed in Dun & Bradstreet.

Q. As to those which are not—

A. Then there is additional work required to determine their credit position.

Q. Well, now, on a transaction basis, wouldn't you assume from your experience that your credit losses are

probably higher with your small trade sales customers than they are with your large industrial customers?

A. Not necessarily so. While you may have small customers—well, put it this way: Whereas the total credit loss from the small customers may involve more transactions, the net loss may not be any greater than from one of the larger customers.

4160 Q. Well, aren't these figures put up on a transaction basis rather than a customer basis or tonnage basis?

A. These are the total losses.

Q. On a transaction basis, however. They have been figured out on these invoices—

A. They have figured—

Q. —on a transaction basis, rather than a total dollar volume or poundage basis.

A. That's right, on a per unit basis.

Q. So that on a per unit basis, your credit losses will be more with the smaller customers on trade sales than they would be with the larger industrial customers; is that not true?

A. No, I still don't follow you on that. Will you rephrase the question?

Q. Well, I will withdraw the question.

Mr. Wright: I have no further preliminary cross.

Mr. DuBose: The offer is pending, your Honor.

Mr. Wright: May I inquire as to the purpose of the offer here?

Mr. DuBose: Yes, Mr. Wright. It is in the record so far that there is a quarter of a cent differential between carload and less-than-carload shipments of dry white lead, and in these exhibits we have attempted to justify that from the cost accounting standpoint. In so doing, this witness has taken all of the carload customers of the

4161 National Lead Company, except those who were shipped by truck in the immediate vicinity of the manufacturing branch, and has shown what the cost was to ship these carload customers, as they customarily do receive shipments in carload quantities, that is, direct from the manufacturing branch to the customer at the carload rate.

This witness has compared that actual cost with the cost of shipping in two other methods, one of which involves shipment from the manufacturing branch to the local ware-

house at a carload rate, and shipments out of the warehouse to the customer at less-than-carload freight rates, or, if it is in the same town, their local trucking rate of 5 cents a hundred, which is certainly a reasonable figure.

The other category, the other comparison, is with that carload rate direct, with a direct less-than-carload shipment, direct from manufacturing branch to customer.

In that way, we believe that this is an accurate and representative picture which shows the actual difference in shipping costs alone, plus invoicing, of shipping these customers in carload quantities; as compared with what it would cost us to ship them in less-than-carload quantities in the two other methods.

Mr. Wright: Your Honor, I want to thank counsel for his statement.

Let us look at these exhibits. Exhibits 215-A and B represent 55 per cent of the total pounds of dry white
4162 lead shipped over the entire country. As the witness has stated, they do not include a substantial tonnage here which is sold in and adjacent to the factory locations of the company.

Now, those factory locations are Philadelphia, Perth Amboy or the Metropolitan New Yorw area, Chicago, St. Louis, and the San Francisco Bay area in California. We know enough about this business to know that all five of those areas are among the most substantial consuming areas for dry white lead in the country. There are figures in the record indicating that in 1941, out of the St. Louis Branch alone, there were 1,381,000 pounds of dry white lead, packed in these containers, sold in St. Louis. We don't know what the corresponding figure would be of the pounds sold in Chicago, the pounds sold in Philadelphia, the pounds sold in the New York area, the San Francisco area. No doubt they are substantial.

They are omitted here. Why are they omitted? Simply because the only transportation costs involved on those transactions would be local cartage, and that would be practically the same whether it was to a carload customer or to a less-than-carload customer. So that the total effect of that would be to materially change the relationship between the figures which appear on here.

Now, let me go on from there. These are not the shipping expenses incurred by the National Lead Company, by this witness' testimony. These are a theoretical extension
4163 of transportation costs on three different bases.

The first basis is l.c.l. from the factory to the customer. That is put in there even though the witness stated that these were to carload customers; so that has no value whatever as reflecting anything that the company did.

Then it is put up on a rail carload shipment directly from the factory to the customer. That may more nearly reflect the facts.

Then it is set up in a third way, showing a carload rate to a selling branch, which may not be the factory branch, with a l.c.l. rate from the selling branch to the factory or to the customer.

Now, we know that in carload quantities, it—or, at least it defies reason to suppose that carload customers are shipped l.c.l. by rail at rates up to $1.27 a hundredweight out of a selling branch warehouse. It was not taken into account that truckload shipments, which may involve quantities as low as 15,000 pounds or 7½ tons, would take a rate materially lower than the less-than-carload rail rate, a rate comparable to the carload rail freight rate on quantities less than a carload. So that the transportation figures, even on a theoretical basis, are further distorted because there is not taken into account the portion of the tonnage which might have moved in truckload.

Now, they are further distorted because all l.c.l.
4164 shipments, or, rather, all shipments to l.c.l. customers, are omitted. Now, some of those l.c.l. customers might have bought carloads. I assume that, since the witness stated that some of these carload customers bought in less-than-carload quantities and that the breakdown was not in carload transactions, but to customers classed as carload or less-than-carload. That further distorts the figures.

Now, what use is made of the figures? Mind you, that 215-A and B relate to every manufacturing branch in the country and that only the last four lines on 215-A and the first six lines on 215-B relate to shipments by the Atlantic Branch. The rest are all outside of that branch territory. Exhibit 217 purports to be the total administrative cost of the Atlantic Branch, including the executives of the branch, all the accounting department, credit department, and so forth, with all the rent, insurance, taxes, pensions, old age benefits, and so forth. The next category is selling expenses, and that is likewise complete as to the branch office.

Now, in that first category of office salaries and office expenses, a portion of that cannot be attributed to the invoice expense and the selling expense of white lead, because the branch manager and the assistant manager in that office are in a supervisory position over the manufacturing operations in the branch, and we know that there are several factories in the branch producing lead
4165 pigments, and there are other factories producing products which are in no way involved in this case by any stretch of the imagination: lead shot, lead pipe, solder, powdered lead, colors in oil, linseed oil, flatting oil, any one of dozens of products which the National Lead Company sells, and which, of course, are sold and handled through this Atlantic Branch.

Now, all that portion of the main office administrative expenses there is tacked on to the selling expenses and overhead on dry white lead, and it can't properly be allocated in that fashion. It relates to production, not only of white lead, but of a host of other products. The whole administrative and selling expense covers every product in the branch, as we have said. How much of it could properly be allocated to dry white lead, I don't know. Apparently this witness doesn't know.

Then, that total figure is divided by what is called a total regular number of invoices. Now, they don't really mean invoices there, because they included in that their so-called billing to agents, which was a final statement they sent the agent at the end of the month on his account. There may have been ten shipments to the agent, twenty shipments, as far as we know, during the month. The effect of including those consignment report billings rather than the actual shipments to those agents is to reduce the total number of regular invoices, and thereby, of course,
4166 to increase this figure $7.42 that appears here, which is arbitrarily said to be the average cost per invoice. Well now, average cost per invoice, as we have seen here, includes the salary of the head of the office relating to production of lead shot, of solder, of any of these other things.

Now, you get over on 216, and here is where all of these exhibits which are related are tied together to form the conclusion for which counsel offers this exhibit. He then compares the three arbitrary figures that he got from 215-A and B, which, as we have seen, have nothing to do

with actual transportation charges on dry white lead, and he adds the freight cost on 20 tons and the invoice cost on 20 tons together, and he says that the per ton cost of administering an invoice and selling and shipping to a carload customer of dry white lead is $5.40 a ton.

Then he says that figuring an l.c.l. customer at five tons—now, I don't know where that five tons came from—an l.c.l. customer can buy up to 19 tons, and he is still an l.c.l. customer; he can buy from 600 pounds to 19,000, or 19¾ tons, and he is an l.c.l. customer. That arbitrary figure of five tons was put in there without any explanation of how it was arrived at, and the invoice cost of $7.45 was added, and then the freight cost based on these different arbitrary things was added, so that you get in three different ways the selling cost per ton as between the l.c.l. and the carload.

4167 Well now, the whole thing is spurious because incompatible elements have been combined. This witness testified that the National Lead Company regularly breaks down its expenses, administrative expenses, selling expenses, and freight expenses as to dry white lead, so that presumably on the basis of those allocations, the respondents could have come in here and said, "As to so many pounds of dry white lead that we sold in 1939 or 1940 or 1941, our administrative expenses properly allocable were so many dollars; our transportation expenses so many dollars; our selling expenses so many dollars," and we would have had the most accurate figure that could have been given on what those expenses were. But this material is made evidence of a wholly unreliable kind.

Trial Examiner Norwood: Well now, in other words, the freight figures you have given here cover shipments over the entire country; is that right?

The Witness: Yes, sir.

Mr. Wright: Only a portion, your Honor, of shipments over the entire country, a very carefully selected portion which is selected in a way that will make the figures come out the way the respondents want.

Mr. Ewing: I object to that, selecting them in a way that would make the figures come out the way the respondents want.

Trial Examiner Norwood: Well, counsel may
4168 speak to that. But do the invoices represented by all that freight—that is, are those invoices included in

this number of invoices you have here on this exhibit, or are you just taking the number of invoices in one particular branch, the Atlantic Branch?

The Witness: Using the Atlantic Branch invoices.

Trial Examiner Norwood: And you are combining them with figures of shipments all over the country that may be covered by a great many other invoices; is that right?

The Witness: Selecting the Atlantic Branch as being representative of the Lead Company.

Mr. DuBose: It is already in evidence, your Honor, that the Atlantic Branch, on trade sales over the years from 1920 to 1941, roughly took care, on trade sales of white lead in oil, of between 25 and 27 per cent of the entire company's business.

Trial Examiner Norwood: Well, if he is adding these expenses here and dividing by the number of invoices, shouldn't this be the number of invoices that cover these shipments which he has tabulated here?

Mr. DuBose: Your Honor, we could do that and it would take us six years.

Mr. Ewing: No, you miss his point. As I understand it, you are referring to those shipments on the two larger sheets.

Trial Examiner Norwood: Yes.

4169 Mr. Ewing: And wanting to know the relationship between them and the invoices shown on 217.

Trial Examiner Norwood: That's right.

Mr. Ewing: Now, the invoices shown on 217 have nothing to do with these shipments of white lead in carload lots all over the country to customers other than metropolitan district customers. The invoice figure, as I understand the witness' testimony, relates to all the business done by the Atlantic Branch alone.

Mr. DuBose: Alone.

Mr. Ewing: And it doesn't relate to all the business represented by the other exhibits.

Trial Examiner Norwood: But added here on 216 and 217 is the freight expense.

Mr. DuBose: That's right.

Mr. Wright: On 216.

Mr. DuBose: As a factor; as one of the factors.

Trial Examiner Norwood: As one of the factors?

Mr. DuBose: That is true.

Trial Examiner Norwood: And it is covered by hun-

dreds or maybe thousands of other invoices that are not counted in this divisor?

Mr. DuBose: That is perfectly true, and, your Honor, this whole argument and your questions and Mr. Wright's statement are all relevant, perhaps in a brief. They
4170 all go to the weight. There has been no dispute as to the identification of these figures, as to exactly what they are, as to their accuracy. I presume we can back them up, and if they want to come up to the Atlantic Branch, we will be glad to show them all the figures.

This whole argument goes to the weight. Now, it is relevant on that.

Trial Examiner Norwood: I agree with counsel on that.

Mr. DuBose: And I think now we are just talking about the admissibility.

Mr. Wright: I beg to differ with counsel on that. My objection didn't go to weight; my objection went to competency. Counsel made a proffer of this, presumably as competent evidence—

Mr. DuBose: That's right.

Mr. Wright: —on this subject. Now, will you tell me what relation 76,000 invoices covering everything from shot to lead pipe and white lead in oil and red lead in oil and all their trade sales and their industrials and their agents' billings and everything else, have got to do with the relative cost of selling these customers on 215-A and B, as against the customers who are not listed here, who buy in less-than-carload quantities?

Mr. DuBose: Well, as I say, that goes to the weight.

Mr. Wright: And 216 is solely devoted to the
4171 purpose of bringing all those together and stating, "This is our relative cost of doing business with these two types of customers," and I submit that it is simply a multiplication and a division of factors which have no relation to each other.

Trial Examiner Norwood: Well, that may be very true, and respondents may introduce a witness here to prove something and his statements may not prove it, but may disprove it, but can I stop him from testifying?

Mr. Wright: Your Honor, I am not suggesting you stop a man from testifying, but I certainly state that a paper such as this 216, which is made up for the purpose of this proceeding to show that the relative cost of doing business

between two classes of customers was so much, is inadmissible unless it has some weight and unless the basic data are competent to show what this purports to show.

Trial Examiner Norwood: Well, I think it is very clear what it does show. There are factors here that may be considered, and I am not going to say what it proves or what it disproves now, but I will give it exhaustive study. These papers are gotten up with a great deal of labor, and it appears to me, looking at it, they have made their statements here and it is made very clear what they are. They have answered all these questions, and I couldn't exclude that from some consideration.

Let the counsel show that they are not competent
4172 to show certain things.

Mr. Wright: Your Honor, I wouldn't suppose for a minute that anyone who really examined those would be misled by the conclusion that appears on there, but I dislike having things in the record which require a great deal of technical explanation as to why they are incompetent and why they don't mean what they say they mean.

Trial Examiner Norwood: But this happens to be that kind of a case.

Mr. DuBose: That is exactly it. If we didn't have the Robinson-Patman Act, we wouldn't have this sort of thing.

Trial Examiner Norwood: In another case—I can cite you there the Standard Brands case—the Commission allowed two or three months to have this survey made, and after we finally analyzed it, we found that they based the whole thing on some predetermined percentages, they called it, and it wasn't accepted by them. But it was received in evidence as their story of how this thing was, and the Commission's experts were given two or three months then to figure the thing out and show just why it didn't apply.

Mr. Wright: Your Honor, perhaps I didn't make myself clear as to one portion of this. Now, you will recall that this witness testified under my examination that regular records are kept, which show a proper allocation of all the various different cost factors actually incurred by the company.

4173 Mr. DuBose: Not between carload and less-than-carload customers. He said that.

Mr. Wright: As to this product. Now, in other words, the exact proportion of the selling and administrative ex-

penses of the Atlantic Branch as to dry white lead are in the possession of the company.

Mr. DuBose: Certainly, but not between customers. What we are trying to do here is to show the difference between carload and less-than-carload.

Mr. Wright: Well now, it is a perfectly proper accounting procedure to have brought in the actual costs, which wouldn't have—

Mr. DuBose: Which wouldn't have meant a thing; wouldn't have meant a thing in this case; wouldn't show the difference. Certainly, over-all we have so much per ton—I think it is $4.86 per ton of dry white lead. What does that mean? I am not testifying and I don't want that to be taken as a figure, but it doesn't mean a thing. It means that out of all the tons that we sell, we have a certain expense. It doesn't show the difference between carload and less than carload.

What we had to do, of course, in a sense, was to make an arbitrary selection. Why? Because under the Commission's theory, the Robinson-Patman Act, you have to have a cost accounting justification for your different 4174 prices, and that is exactly why we did it.

Trial Examiner Norwood: I shall overrule the objection and receive the exhibits. These objections that go to the weight can be met by other evidence or argument.

I have been very much interested in what has been said on both sides, and it has thrown a great deal of light on this paper, and I think it will lessen my work there, but I don't see how I could exclude it, how I can say that it does prove this thing conclusively, or that it doesn't prove anything at all. I can't say that now.

Respondents' Exhibits 215-A, 215-B, 216, and 217 are now received in evidence.

(The documents referred to, heretofore marked for identification as RESPONDENTS' EXHIBITS 215-A, 215-B, 216, and 217, were received in evidence.).

Mr. DuBose: Off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Mr. DuBose: May we have this marked for identification? I think the next number is 309.

Trial Examiner Norwood: Yes.

(The document referred was marked Respondents' Exhibit 309 for identification.)

Direct Examination (Continued) by Mr. DuBose.

4175 Q. Mr. Owens, I show you Respondents' Exhibit 309 for identification, and I ask you to tell us what that purports to be.

A. This is a statement showing the cost of both soft and heavy paste packages in four sizes, 12½'s, 25's, 50's, and 100's; cost per 1,000 packages; cost per package. We then translated the cost into 100 pounds of material packed, that is, the package cost, and then we have the cost per 100 pounds of material packed in 12½'s, 25's, and 50's, the cost in excess of the 100-pound size.

Q. In other words, the last figure on the right under the two general headings, shows the excess of the cost of the package alone, of the 100 pounds of material packed in 12½-pound packages, 25 and 50, over the cost of a single 100-pound container; is that correct?

A. Correct.

Q. And that is for white lead in oil, both heavy paste and soft paste?

A. Correct.

Q. Now, when you say heavy paste, what do you mean?

A. Heavy paste means white lead in oil, 91 per cent carbonate and approximately 9 per cent oil.

Q. And soft paste is what?

A. Soft paste is a white lead paste with approximately 89 per cent carbonate, 9 per cent oil, 2 per cent turpentine.

Q. And I show you these documents and ask you 4176 whether these are invoices covering the package cost per thousand packages shown on Respondents' Exhibit 309 for identification.

A. Yes, they are.

Mr. DuBose: I offer in evidence Respondents' Exhibit 309 for identification.

Mr. Wright: No objection.

Trial Examiner Norwood: Received.

(The document referred to, heretofore marked for identification RESPONDENTS' EXHIBIT 309, was received in evidence.)

Mr. DuBose: That is all we have of this, I hope our final witness, but Mr. Ewing has a statement.

Trial Examiner Norwood: Have you any cross-examination?

Mr. Wright: I would like to make a brief examination of the witness on several questions.

Trial Examiner Norwood: Yes.

Cross-Examination by Mr. Wright.

Q. Going back to the source of your information on these different customers, I believe you stated that you had a book showing all the carload customers of dry white.

A. A book showing all the customers?

Q. Broken down as to carload and less-than-carload customers.

A. No, sir; it is not broken down into carload customers.

4177 Q. Just carload customers?

A. It is a book containing all the names of all the customers of dry white lead.

Q. How do you know which ones are carload and which ones are less?

A. I believe I put into testimony that it was with the help of the sales manager of the dry lead department. He ascertained who the carload customers are who the l.c.l. customers are.

Q. For this purpose, then, you did distinguish as between those customers?

A. That's right.

Mr. Wright: No further cross.

Trial Examiner Norwood: What would be your estimate of the number of invoices that would be represented by the shipments that are tabulated here and entered on Respondents' Exhibit 215-A and B? You entered here on 217 "Total Regular Number of Invoices" and you have divided that into some totals here which include total freight for the entire country; isn't that right?

The Witness: This represents the entire country.

Trial Examiner Norwood: Yes. Now, what would you say would be the number of invoices which would be involved in the freight which you have entered on these large sheets? The 76,238 for 1939 represents the invoices of the Atlantic Branch?

4178 The Witness: Alone; yes, sir.

Trial Examiner Norwood: Well now, what would be your estimate of the other invoices that were issued with respect to this freight that is entered in here on these large ones?

The Witness: I am afraid I couldn't give you even an estimate of that.

Trial Examiner Norwood: Well, it would be considerably more, would it, or not? A small amount or a large amount?

The Witness: We have the total number of invoices for the Atlantic Branch.

Trial Examiner Norwood: Yes.

The Witness: Now, if we assume that the Atlantic Branch represents 25 per cent of the trade sales of the company, then I would assume that this figure of 76,000 represents approximately 25 per cent of the total number of invoices rendered by the National Lead Company in the year 1939.

Mr. DuBose: '41.

Trial Examiner Norwood: I see.

Mr. Ewing: I would like to direct attention to page 4126 of the transcript where Mr. McCarthy was called last week, where he testified with respect to Respondents' Exhibits 229 to 305-D for identification, that in each and every instance the document was a copy of the telegram. Examination shows that practically every one is a copy of a telegram, but one or two of them are letters or attached memoranda.

4179 Mr. Wright: I am willing to concede that the documents show on their face what they are, and he may have been mistaken as to what they are.

Mr. Ewing: I thought there would be no objection to correcting such a minor error.

Might I substitute for the originals, which we are offering as Respondent's Exhibits 229 to 305-D inclusive, photostatic copies, and offer them as those exhibits?

Mr. Wright: No objection.

Trial Examiner Norwood: Yes, counsel may.

Mr. DuBose: They have been marked on the photostats.

Mr. Wright: No objection to the offer, either.

Trial Examiner Norwood: Those are exhibits that were previously marked?

Mr. DuBose: They were marked last week in New York.

Mr. Ewing. Exhibits 229 to 305-D inclusive.

Mr. DuBose: There are some sub-letters in there. You remember, your Honor, you took those down.

Trial Examiner Norwood: I have a list of them on my docket; 229 to 305-D, correct. Is there any objection?

Mr. DuBose: There is no objection.

Trial Examiner Norwood: They are received in evidence as Respondents' Exhibits 229 to 305-D as sublettered in the case of some of them, and heretofore shown on the record.

(The documents referred to, heretofore marked for identification RESPONDENTS' EXHIBITS 229 thru 233, 234-A and B, 235, 236-A & B, 237-A & B, 238 thru 240, 241-A & B, 242-A thru D, 243-A & B, 244-A thru G, 245, 246-A thru N, 247-A & B, 248 thru 251, 252-A & B, 253 thru 258, 259-A & B, 260-A & B, 261-A & B, 262 thru 270, 271-A & B, 272 thru 286, 287-A and B, 288 thru 291, 292-A & B, 293, 294, 295-A & B, 296 thru 304, 305-A thru D inclusive, were received in evidence.)

4180

Mr. Wright: May we have a short recess?

Trial Examiner Norwood: We will take a five-minute recess.

(A short recess was taken.)

Trial Examiner Norwood: Proceed.

Mr. Wright: I would like to have this marked as Commission's Exhibit 866-A and B.

(The document referred to was marked Commission's Exhibit 866-A and 866-B for identification.)

Mr. Wright: I would like to offer Commission's Exhibit 866-A and B and stipulate at the same time that if witnesses are called by the National Lead Company, they would testify in accordance with the statement that Mr. Ewing is now going to read.

Trial Examiner Norwood: I had better rule on the proffer, first.

Mr. Ewing: There is no question about the fact that that is a copy of a letter that was actually written.

Trial Examiner Norwood: This is the exhibit to which Mr. Wood strenuously objects?

Mr. Ewing: That's right.

Mr. Wright: I might say in that connection, your Honor, I am not contending that the National Lead Company ever acquired the Eagle-Picher Company.

4181

I think it is relevant in this case as to the state of mind of the National Lead Company and its corporation officials at various times during this period, and certainly

this letter indicates that. It goes to one of the issues in the case, about the alleged intent of the National Lead Company to monopolize this business.

Mr. Ewing: As I said, there is no question that this is a copy of a letter actually written. I would object to it on the grounds that it is incompetent, irrelevant, and immaterial, but not on the ground it is not a copy of the letter.

Trial Examiner Norwood: Well now, I will defer the ruling on this until I have studied it very carefully, on account of Mr. Wood's being absent.

Mr. Wright: Well, your Honor, could we take a short recess and you rule on it then, because I have another offer that I am going to make based on this.

Trial Examiner Norwood: Well, I wanted to ask you if you think we will have an afternoon session.

Mr. Ewing: Well, as far as we are concerned, when I read this statement, we are through.

Mr. DuBose: Your Honor, may we say that we would like to join, in so far as National Lead is concerned, with the second objection noted on the record by Mr. Wood, namely that a vio[illegible]tion of Section 2 of the Sherman
4182 Act is not w[illegible] the jurisdiction of the Federal Trade Comm[illegible] Section 5.

Mr. Wright: [illegible] go off the record?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: Back on the record, now.

I have heard discussion on this by counsel, and I have read the letter carefully, and I think that it may be admitted for the sole purpose of showing that National Lead made an offer to purchase Eagle-Picher, and I don't see how this could prejudice Eagle-Picher in any way whatsoever, and I will overrule the objections and receive the exhibit, Commission's Exhibit 866-A and 866-B.

(The document referred to, heretofore marked for identification COMMISSION'S EXHIBIT 866-A and 866-B, was received in evidence.)

Mr. Ewing: With respect to Commission's Exhibit 866-A and B, it is stipulated that if a witness or witnesses from National Lead were called, he would testify with respect to that exhibit as follows:

Early in 1931, Frederick Hertenstein, a vice president of the Eagle-Picher Lead Company, and a member of its board of directors, suggested to Edward J. Cornish, presi-

dent of National Lead Company, that he consider the purchase by National Lead Company of a large block of stock of the Eagle-Picher Lead Company. Thereafter, ne-
4183 gotiation developed into a proposition that National Lead could purchase the physical assets and good will of the Eagle-Picher Lead Company, and on or about March 14, 1931, National Lead requested of the Attorney General of the United States an expression of his attitude with respect to such a proposition. From time to time, National Lead Company supplied the Department of Justice with additional data.

On or about May 8, 1931, the Department of Justice advised Edward J. Cornish that it preferred to express no opinion as to the legality of the proposed transaction. On May 12, 1931, Edward J. Cornish sent Frederick Hertenstein a written proposal addressed to the President and Board of Directors of Eagle-Picher Lead Company, with the request that Hertenstein present it in proper form to the company.

Hertenstein returned the written proposal to Cornish with the advice that neither he nor his associates approved of the proposal as made, and that he would not submit it to the Board of Directors of the Eagle-Picher Lead Company.

A copy of this written proposal was sent to the Department of Justice at the same time that the original was sent to Hertenstein. The original is in the possession, at the present time, of the National Lead Company. The negotiations were never resumed, and no transaction along the line proposed was ever consummated.

Trial Examiner Norwood: Is that agreeable?

4184 Mr. Wright: I am agreeable to stipulating that witnesses, if called on behalf of the National Lead Company, would so testify.

Trial Examiner Norwood: Is there anything further?

Mr. Wright: Yes, your Honor. I would like to have marked for identification Commission's Exhibit 867 and sub-numbers, and Commission's Exhibit 868 and sub-numbers.

(The documents referred to were marked Commission's Exhibit 867-A through 867-L, and Commission's Exhibit 868-A through 868-O for identification.)

Mr. Wright: In the hearing at Cleveland, in connection with the offer of Respondents' Exhibits 199 and 200, which

were maps prepared by the traffic department of the Sherwin-Williams Company, showing breaking points of freight rates, or purporting to show breaking points of freight rates as between producing points of white lead and red lead and litharge, there were submitted for convenience of Commission's counsel, computations of the rates, the actual rates in cents per hundredweight at the various points indicated on those maps, together with tariff references, showing the sources of those rates.

I have had the material relating to dry white lead and white lead in oil marked as Commission's Exhibit 867-A to 867-L for identification, and I have had marked as Commission's Exhibit 868-A to 868-O for identification,
4185 the comparable material relating to red lead, red lead in oil, and litharge. I would like to offer those exhibits by agreement of counsel as thus identified.

Mr. Welch: That's all right.

Mr. Wright: What is the state of the record?

Mr. Welch: I said I agree.

Trial Examiner Norwood: Has other counsel agreed to the exhibits?

Mr. DuBose: Well, as far as National Lead is concerned, we have no way of checking those rates, and subject to correction—

Mr. Wright: May I say that I am not offering those as the rates. I am offering those as a list of the rates and the tariff references which were used by the traffic department of the Sherwin-Williams Company in making up Respondents' Exhibits 199 and 200.

Mr. DuBose: No objection on that score.

Trial Examiner Norwood: They may be received as marked, Commission's Exhibits 867-A through L and 868-A through O.

(The documents referred to, heretofore marked for identification COMMISSION'S EXHIBIT 867-A through 867-L and COMMISSION'S EXHIBIT 868-A through 868-O, were received in evidence.)

Mr. Wright: Your Honor, I would now like to re-
4186 offer Commission's Exhibits 527 and 528.

Mr. DuBose: What are they?

Mr. Wright: May we go off the record?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Mr. Wright: May I make a statement in connection with my re-offer now?

Trial Examiner Norwood: Yes.

Mr. Wright: These exhibits are photostatic copies of carbon copies of letters addressed by Albert Chatfield, a stock broker in Cincinnati, Ohio, to Messrs. E. J. Cornish and F. M. Carter, Chairman of the Board and President of National Lead Company respectively, under dates of June 15 and July 20, 1935. The exhibits were produced by the National Lead Company under subpoena and were identified by counsel for that company as being "true and correct photostats of document supplied and furnished by National Lead Company" to the Federal Trade Commission, and each of them was further identified as "a letter" addressed to the respective officials of the National Lead Company.

They were first offered in evidence and discussed on pages 585 to 594 of the transcript, were reoffered at pages 679 and 681 of the transcript. They were previously excluded on the ground that they had not been sufficiently connected up.

I would like to call your attention to Commission's 4187 Exhibit 700-B, which is a transcript from the stock transfer agent of the Eagle-Picher Company, showing 44,900 shares of common stock of Eagle-Picher in the name of E. J. Cornish over a period of time from 1932 to 1943.

Mr. DuBose: 1930, it should be.

Mr. Wright: Well, at any rate, that exhibit has the dates correctly.

Respondents' Exhibit 183 is a document prepared by National showing its ownership of Eagle-Picher stock, including dates of purchase and dates of sale.

Mr. Chatfield was called as a witness in this proceeding. Although these documents had not been produced by him, they came from the files of National, and your Honor will note on the upper corner of the letters the legend indicating that they were from the files of Frederick M. Carter, who is the president of the company.

When Mr. Chatfield was examined, he was a reluctant witness. When he was asked about Commission's Exhibit 527 for identification, whether it was a copy of a letter from him to Mr. Cornish, he said:

"Well, it must be. I went in to see Mr. Cornish on several occasions originally, about stock owned with National Lead in view of purchasing, and I may have written this letter in answer to that interest."

When he was asked whether he had received any
4188 letters back from Mr. Cornish in response to any letters he wrote, he said that he had not, and that communications from Mr. Cornish were:

"Well, just by telephone or he would be out here or something like that."

And when he was asked if he recognized Exhibit 528, he said:

"That is a letter written to Mr. Carter, President of the National Lead Company."

And he was asked, "By whom?" and he said:

"Signed by me. This was a month later."

Trial Examiner Norwood: Chatfield said that?

Mr. Wright: Yes. The Examiner, Mr. Ballinger, said:

"Now let me see if I understand this. Do I understand that you wrote these two letters to Mr. Carter?"

And the witness, Chatfield, said:

"No. One letter was written to Mr. Cornish."

The Examiner said:

"Did you receive a response from that letter?"

The witness said, "No."

Mr. Ballinger said:

"Did you receive a response to the letter to Mr. Carter?"

Mr. Chatfield said:

"No. As I remember, I didn't receive anything.
4189 This Mr. Weatherhead lived in New York City and he had charge of the whole matter and nothing ever came of it. We couldn't do anything with it, and Mr. Weatherhead, at this time I think he is dead. He has been dead for several years."

The question was then asked: "These letters were in response to communications that you had with Mr. Weatherhead?

"Answer: No, these letters were in response to conversations that I had in New York City with Mr. Carter.

"Question: And they were in response to and pursuant to those conversations, is that correct?

"Answer: Well, I guess so. I don't—this thing has been so long ago that it is very vague in my mind. I have been through so much in the way of securities since this deal that we usually dismiss them when there is nothing to it. The whole thing didn't amount to anything."

Now, on the basis of that testimony, it is a reasonable inference that Mr. Chatfield was engaged in negotiations

involving the securities of the Eagle-Picher Company with Mr. Cornish and Mr. Carter. While he had no clear independent recollection of the details of that business, and while he didn't remember the details of these particular letters, he recognized them as copies of letters that he had sent to these gentlemen relating to subjects that he had had conversations with them about in person in New York
4190 City, and apparently in Cincinnati.

Now, later on, Mr. Simon, Treasurer of the National Lead Company, was called as a witness for the Respondent. He is the gentleman who identified Respondents' Exhibit 183, which was the record of purchases and sales of that stock. He stated, first of all, that the stock which was held in Mr. Cornish's name was actually stock owned by the National Lead Company, and it was in the possession of the National Lead Company, although not on the transfer of records of the Eagle-Picher Company.

Then he stated that it was an investment and he could point to the profit that was ultimately made in selling that stock. He could only point out one other common stock that had been purchased by the National Lead Company as an investment in similar circumstances, and that was stock of the American Smelting and Refining Company.

Mr. DuBose: Wasn't that preferred stock, Mr. Wright?

Mr. Wright: It may have been preferred stock, the A. S. & R. stock. At any rate, he testified that that was not held in the name of Mr. Cornish and Mr. Carter. That was held in the name of the National Lead Company. He was asked why, and he said, "Well, we thought that would be all right in that situation."

Then he was asked why it was that in Respondents' Exhibit 183 there was a succession of small purchases of
4191 blocks of stock, 100 shares one day, 200 shares another day, 300 shares another day, in successive periods of three days, a week, two weeks, three weeks. The stock was then selling from $3 to $5 a share, so that a block of 100 shares represented a very small amount of money. The stock was not listed on the New York Stock Exchange.

He was asked if there was a standing order, a firm order with brokers in Cincinnati, to pick up that stock. He said no. He said, "We would receive telephone calls, Mr. Cornish or myself, from some broker in Cincinnati."

Mr. DuBose: A. and J. Frank.

Mr. Wright: "Who would say, 'Well, we have 100 shares of Eagle-Picher stock. Would you be interested in purchasing it?'" and presumably they would say, "Yes, we would be interested in purchasing it," and then a week later another call would come in about a similar quantity. Except for three or four purchases, they were all small quantity purchases over a period of time.

Now, we have just received into the record an exhibit which shows that the National Lead Company, immediately prior to the dates on which the purchases of Eagle-Picher stock commenced—

Mr. Ewing: That is incorrect.

Mr. DuBose: I think in August 1930.

Mr. Wright: Well, the bulk of the purchases, I
4192 believe, occurred in a period subsequent to the date of May 12, 1931, and continued on for a period of several years, including the time covered by 527 and 528.

Now, the witness Chatfield, by his testimony, has been established to have been acting for the National Lead Company in some security transaction—

Mr. Ewing: No.

Mr. Wright: —the details of which were hazy in his recollection.

Mr. Ewing: No.

Trial Examiner Norwood: Go ahead.

Mr. Wright: By the very information contained in those exhibits themselves, an agency relationship is established between him and Mr. Cornish or the National Lead Company in the transaction involving Eagle-Picher securities.

Now, it is uncontroverted that those documents were genuine documents, letters, held in the files of Frederick M. Carter, the President of the National Lead Company, and brought in by the National Lead Company. It is uncontroverted that Chatfield had at that time some relationships involving the Eagle-Picher stock with Mr. Cornish and Mr. Carter. We know now that Cornish was buying, in his own name, for National Lead, a considerable quantity of Eagle-Picher stock. We know that in 1931 he had tried to acquire the physical assets of the Eagle-Picher Company.

4193 I submit that these exhibits, which are of unquestioned genuineness, and are of unquestioned relevance, are admissible in this proceeding, and I respectfully reoffer them.

Trial Examiner Norwood: Has counsel any objection to the receipt of these?

Mr. Ewing: It certainly has. In the first place, the witness Chatfield testified, if I am correct in my recollection—and I am quite certain I am—that he tried to work up a deal, and the quotation read by Mr. Wright a few moments ago shows he didn't work up a deal.

There isn't any doubt about what stock we did buy. The record shows that. But there also isn't any doubt about the fact that these letters were written by Chatfield on his own behalf, trying to work up a deal that was not worked up, and that he wasn't our agent or anybody else's agent as far as these respondents were concerned. It was his attempt to work up a deal, and he didn't do it, and what earthly relevance they have—it has all been gone over before. Nothing that has come into the record in any way improves the Commission's counsel's position as far as the offer of these letters.

Trial Examiner Norwood: Hasn't Mr. Chatfield testified since I ruled?

Mr. Ewing: No, sir.

Mr. Wright: Mr. Simon testified, the treasurer. Mr. Simon testified and brought in a record of these pur-
4194 chases, showing purchases ranging from $800.

Mr. Ewing: Through A. & J. Frank, and not through Chatfield.

Mr. Wright: He said brokers in Cincinnati, and I said, "What brokers?" and he said, "Some of it was A. & J. Frank," but he did not testify that.

Mr. Ewing: Well, you know he didn't buy from Chatfield because Chatfield made no deal.

Trial Examiner Norwood: I said—

Mr. Wright: Well, Mr. Simon was unable to bring in a record to show exactly from whom all those purchases were made.

Mr. Ewing: The man who wrote the letters that you are now offering, who wrote those letters, himself testified he made no deal, so it is perfectly clear that nobody bought any stock through him.

Mr. Wright: I am willing, just as in the other exhibit, to accede to the fact that National never had over the amount of shares which had been testified on there, and that certainly they did not acquire a controlling stock interest.

Mr. Ewing: I don't want any inference that National was going after Chatfield to make a deal, because the evidence is clear that it wasn't, and I strenuously object.

Mr. Wright: Now, you will notice the name of a
4195 gentleman that is mentioned in one of those letters there is a gentleman whose name has figured in a recent exhibit here.

Mr. Ewing: He could mention anything he wanted.

Mr. Wright: Mentioned as being the man he talked to in this connection.

Mr. Ewing: What has that got to do with their admissibility?

Mr. Wright: There has already been a relationship established by the Chatfield testimony.

Mr. Ewing: The relationship established is that Chatfield tried to work up a deal.

Mr. DuBose: And nothing came of it.

Mr. Wright: Well now, the letters show on their face the subject of the transaction, and he testified that the letters were written in response to conversations that he had had with Mr. Cornish and Mr. Carter in New York.

Mr. Ewing: He didn't testify that Mr. Cornish or Mr. Carter asked him to write them.

Trial Examiner Norwood: I suppose we will have an after-lunch session here, and I will reserve the ruling on this. I want to review that testimony of Mr. Chatfield's first.

Let's recess until 2:00 o'clock.

(Whereupon, at 12:30 p.m., a recess was taken until 2:00 p.m. this day.)

4196 Afternoon Session.

2:15 p.m.

Trial Examiner Norwood: The hearing will come to order. I have just received an air mail, special delivery letter from Mr. Edmund P. Wood, representing the respondent Eagle-Picher Lead Company, making certain objections, and I shall enter it on the record and give him the benefit of an exception to any rulings that I made this morning or will make respecting the subject-matter of the letter. The letter reads as follows:

"Dear Sir:

"Mr. Ewing has transmitted to me a copy of the statement which he transmitted to Mr. Wright by letter dated November 17, 1947. Mr. Serviss and I have carefully checked the statement in relation to the obtainable information and believe the statement to be a correct and accurate statement. Nevertheless, I object to the introduction of any and all evidence pertaining to the negotiation which failed, on the grounds which I stated upon the Record last Friday in New York. Further, I shall move to have stricken from the Record certain testimony introduced in the early phase of the case pertaining to the same general subject matter.

"The Eagle-Picher Company is operated by its present management and there can be no proper issue in the case which does not pertain to the propriety of present conduct.

The proffered evidence should not be received be-
4197 cause it is not pertinent.

"Moreover, the evidence should not be received because it is incompetent. Mr. Hertenstein, who is now dead, was acting primarily on his own behalf as a large stockholder in the Eagle-Picher Lead Company, and his motives back there in 1931 are beyond recall. Certainly the Trial Examiner will take judicial notice of the fact that 1931 was a critical and unusual time in which wealthy men were daily leaping from windows, some literally, some figuratively. Some thought about such things and lost their nerve or changed their minds. It is hard enough to draw proper inferences from events which actually happened, much less from events which did not happen. No

useful purpose will be served at this time by attempting to hold a speculative post mortem over an abortive transaction long since consigned to oblivion.

"Very truly yours,
/s/ Edmund P. Wood."

I now want to settle the matter of Commission's Exhibits 527 and 528. I have been very much interested in the argument; during the luncheon hour I have gone back and reviewed this matter and reviewed the evidence of Mr. Chatfield.

I am of the opinion that it has been sufficiently connected to receive in evidence and I shall, therefore, receive the exhibits for whatever value they may have.

Off the record now.

4198 (Discussion off the record.)

Trial Examiner Norwood: Commission's Exhibits 527 and 528 are received in evidence.

(The documents referred to, heretofore marked COMMISSION'S EXHIBITS 527 and 528 for identification, were received in evidence.)

Mr. Wright: If your Honor please, we have reached a point now here where, except for one minor point, I do not believe there is anything pending for the record. That point is one which I raised at the time when I entered into a stipulation with Mr. Welch in New York as to what the witness Coolidge would testify if he were called to the stand.

At that time I said there was one point in his testimony which I had some reason to question, and that I wanted an opportunity to rebut an inference that might arise, namely, the statement that if he were called to testify, he would say that all the white lead in oil bought by Sherwin-Williams on the Pacific Coast was purchased from Premier and Fuller except for isolated shipments in carloads.

Mr. Welch and Mr. McDowell have been trying to work out something on this matter which would show exactly what the situation was with reference to the division of purchases by Sherwin-Williams and shipments from their own Chicago plant.

If it cannot be worked out, I want to reserve the right to recall Mr. Coolidge for the limited purpose and only
4199 for the purpose of cross-examining on the basis of that statement, and I am only going to that phase of the matter only.

I understand Mr. Ewing and Mr. Welch are agreeable —off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Mr. Wright: On the record. Therefore, if it is agreeable to your Honor, we can close the taking of testimony today on that one condition. That will make this the conclusion of the taking of testimony, and any further proceeding on that minor point will involve only counsel of Sherwin-Williams, no other counsel except Sherwin-Williams' counsel, and there will be no evidence or testimony admissible except for that limited purpose, and while I hope it may be possible to settle it by an agreed-to statement on that situation by counsel of Sherwin-Williams, it may be necessary for that one witness to appear and testify.

Trial Examiner Norwood: Is that agreeable?

Mr. Ewing. That is correct.

Mr. Wright: And now, subject to that one condition, it appears that we could close the record at this point and take up the matter of further proceeding.

Trial Examiner Norwood: Yes.

Mr. Wright: I might add that, on that point, the matter involving Mr. Coolidge will be concluded one way or another within the next week or ten days.

4200

Trial Examiner Norwood: Then, on the basis of the statement by counsel, I will now formally close the taking of testimony. If it is necessary, on this one point discussed by counsel, to take testimony on that point, as to that it will be a reopening, which I have a right to make in the meantime; but the taking of testimony is now formally concluded.

Counsel will be allowed until Monday, December 1, 1947, in which to file any arguments, briefs or requests for findings which they may submit to me.

These should be filed with the Secretary and the Trial Examiner will be furnished copies promptly; but if counsel so desire, they may submit whatever informative material by way of briefs or requests for findings—I will call them proposals—they may submit these proposals in part only, if they wish, directing attention to those points as they consider controverted issues, and may submit fuller and more complete proposals for findings and conclusions before the Commission prior to the consideration of their case on the final hearing.

Mr. Ewing: While counsel for the respondent fully appreciate your position in the matter of filing proposed findings and conclusions and your interest in making the suggestions that you have made with respect thereto, we feel that we must take an exception to the ruling re-
4201 quiring the filing by December 1 because of the time situation, and we would like permission to ask the Commission for an extension.

Trial Examiner Norwood: Yes.

Mr. Ewing: And I repeat, we appreciate your position on that, your Honor.

Trial Examiner Norwood: Off the record now.

(Discussion off the record.)

Mr. Wright: On the record. We have no objection to that at all.

Trial Examiner Norwood: Counsel may take the matter up and call me, and whatever date the Commission orders will be the date they will observe in filing their proposals.

Mr. Wright: It is my understanding all counsel will attempt to compose any differences they might have on corrections to be made in the record, and that that will be undertaken just as soon as it is physically possible and at a later date, within a short period of time, any differences that cannot be composed on proper corrections in the record will be submitted to you.

Trial Examiner Norwood: I think you will find that the Rules provide with respect to corrections of the record that those proposed corrections shall be listed in triplicate citing the page and line of each correction and indicating the corrections which they think should be made, and that opposing counsel shall get a copy and one copy is
4202 sent to the Trial Examiner, and they inform each other then as to any objections they may have, and also inform the Trial Examiner.

Mr. Wright: My statement was made on the basis of discussion I have had with counsel in the hope we could eliminate the submission of corrections by six different sets of counsel in the matter.

Trial Examiner Norwood: Yes.

Mr. Wright: And with the hope, if possible, they might agree in advance on corrections so there will only be one list; and any that are controverted or upon which they could not agree will be submitted in accordance with the Rule.

Trial Examiner Norwood: Is that agreeable?

Mr. Ewing: Yes.

Mr. Welch: Off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: It is the rule of the Commission that no corrections be entered physically on the record and that no corrections be allowed except those which involve a change of substance; but I see no harm in approving the entire list of corrections and incorporating them into the record.

After your proposals are in we could set a day for final hearing at which these corrections will be approved and then counsel may argue the case.

4203 One reason that I suggested you put in abbreviated proposals to me and enlarge on them later before the Commission is because I think you will be able to work that out much better after you see the Trial Examiner's report. So, whatever the counsel desire to do about that or whatever the Commission may authorize, I will inform you later.

Off the record.

(Discussion off the record.)

Mr. Wright: On the record. Pursuant to our discussion, your Honor, I make the motion that it be ordered by you that on the day one week following the last day for filing proposed findings and conclusions that we assemble here for the purpose of hearing argument by counsel on both sides as to their contentions.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record. Is that agreeable to counsel?

Mr. Ewing: That is agreeable.

Trial Examiner Norwood: It is understood that corrections in the record be submitted by counsel and settled at the last hearing or prior thereto.

The hearing is adjourned to reconvene as stated in the motion. We will reconvene at ten a.m. on that date in Room 332, Federal Trade Commission Building, Washington, D. C.

4204 (Whereupon, at 2:40 o'clock p.m., November 20, 1947, hearing in the above-entitled matter was adjourned.)

4205 Room 332
Federal Trade Commission Building
Washington, D. C.
Wednesday, January 7, 1948.

Met, pursuant to adjournment and agreement, at 10 a.m.

Before:

John W. Norwood, Trial Examiner.

Appearances:

Joseph S. Wright, Esq., appearing for the Federal Trade Commission.
James D. Ewing, Esq., and E. Z. DuBose, Esq., appearing for the National Lead Company.
J. T. Welch, Esq., appearing for The Sherwin-Williams Company.
Roger Hinds, appearing for The Glidden Company.
Edmund P. Wood and
Richard Serviss, appearing for Eagle-Picher Company.
H. E. Gardiner, Esq., appearing for International Smelting Company and Anaconda Copper Mining Company.

4206 PROCEEDINGS.

Trial Examiner Norwood: The hearing will come to order. Pursuant to adjournment on November 20, 1947, and agreement of counsel, the hearing in Docket 5253 is now reconvened, for the purposes as heretofore stated and agreed on, in Room 332, Offices of the Federal Trade Commission, Washington, D. C., at 10 o'clock a.m. on the 7th day of January 1948. The following counsel appear:

Appearing for the Federal Trade Commission: Joseph S. Wright.

Appearing for the respondents: James D. Ewing; E. Z. DuBose; J. T. Welch; Roger Hinds; Edmund P. Wood; Richard Serviss and H. E. Gardiner.

Off the record.

(Discussion off the record.)

Trial Examiner Norwood: Proceed, Mr. Wright.

Argument on Behalf of the Commission.

Mr. Wright: Your Honor, there was one matter relating to the respondent Sherwin-Williams Company pending from the last hearing. In the interim, counsel for Sherwin-Williams and myself have agreed upon a stipulation of facts which has also been submitted to the other counsel relating to the testimony of Witness Coolidge and to certain designations in Commission's Exhibits 791 and 794 regarding Sherwin-Williams freight rates and invoice transactions, and I would like to have this stipu-
4207 lation read into the record. Is that satisfactory to you, Mr. Welch?

Mr. Welch: That is satisfactory to Sherwin-Williams.

Mr. Wright: The stipulation is as follows:

"It is stipulated and agreed by and between counsel for respondent The Sherwin-Williams Company and counsel supporting the complaint that the stipulation entered into between counsel and appearing in the transcript at pages 4069 and 4070 may be and the same is hereby amended by substituting for the second full paragraph thereof appearing at lines 11 through 18 inclusive of page 4070 of the transcript the following, which would be the testimony of the witness S. B. Coolidge if he were further recalled as a witness in this matter, and that same may be considered to the same extent and effect as if the said S. B. Coolidge had so testified:

"In 1941 Sherwin-Williams sold 637-600 pounds (318 tons) of white lead-in-oil on the Pacific Coast. The records as to the sources from which this white lead was obtained are not now available. Some was purchased from W. P. Fuller Company, some was purchased from Premier Paint & Color Works, both of which concerns have white lead plants located on the Pacific Coast, and a substantial portion was also shipped from Sherwin-Williams' plant in Chicago in mixed carload lots with paint products. Since 1941 the percentage purchased on the Pacific Coast has substantially increased and the portion shipped from
4208 Chicago has decreased correspondingly.

"It is further stipulated and agreed by and between counsel that the designation 'Richmond, Indiana' appearing in Commission's Exhibit 791 should be 'Richmond, Virginia'; and that the freight rates appearing in Commission's Exhibit 794 Z-9 to Z-12 inclusive are rail freight rates."

Trial Examiner Norwood: You may proceed.

Mr. Wright: Your Honor, I have not had an opportunity to go into the proposed findings and conclusions—

Trial Examiner Norwood: Just one minute, please. Are there any corrections to the record to be proposed here?

Mr. Ewing: There are corrections for the record, but in view of the necessity of working in connection with the preparation of the findings, I am frank to say we have not completed ours, and I think Mr. Wright is in the same position.

Mr. Wright: I am in the same position. Sherwin-Williams through counsel has submitted a list to me but I have not had opportunity to go into them.

Mr. Ewing: I don't think there will be anything substantial.

Mr. Wright: There are a number of, for instance, erroneous descriptions of the exhibits in the record which might be important, though most of them are apparent from the context of the record itself. May we go off the record on this discussion?

4209 Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: Proceed now on the record.

Mr. Wright: Your Honor, I must begin by stating that I simply have not had an opportunity to examine in detail all of the proposed findings and conclusions which have been filed by the respondents and the citations thereto. So, I am in the position of stating that I am in disagreement with so many of those findings and conclusions which have been filed which are contrary or inconsistent to those which are contained in the proposed findings and conclusions which I submitted.

Trial Examiner Norwood: I will state now for the record that all counsel will be given the opportunity to submit to me any further proposals or any written replies to the other proposals or citations. The only requirement is that the other side shall be furnished with a copy, and that privilege to all counsel will be extended to January 25. Those proposals or documents may be mailed to me with a statement that they are being furnished to the other counsel as well. You may go ahead.

Mr. Wright: I would like to state in rather general terms the series of contentions that I have here on the basis of the record. First, Count 1: It is my contention

that the lead pigment industry in its origin was one made up of a large number of small producers located all
4210 over the entire face of the country; that beginning with the organization of the National Lead Company in 1891, which consolidated into one ownership a large number of the previously independent producers and sellers of lead pigments, and continuing on down through with the subsequent acquisitions by the National Lead Company, that through these acquisitions and consolidations the physical organization and make-up of the industry was completely and radically altered, so that finally when the period 1933 was reached, there were relatively a very few remaining producers, and of these producers National was by far the largest and in a dominant position. Up to this point, 1933, however, there were at least some vestiges of the localized marketing methods and pricing practices remaining in the industry from the period in which it was composed of a great many small producers.

In the white lead-in-oil and cake products business there obtained up to 1933 a system of differential and free delivery points which for the purposes of respondents' subsequent activities presented great difficulty in the meeting and matching of prices. As is shown in the list of differential points appearing in Commission's Exhibit 659-C, there were literally hundreds of different towns and cities which were either free delivery or equalization points.

As to the equalization points, in order to quote a delivered price it was necessary for the respondent to make a freight calculation. May I amend that? When selling
4211 at a locality which was not included in this list of points it was necessary for the respondent in order to quote a delivered price to make a freight rate calculation and to compare the shipping rate to the location of the customer with the freight rate to the equalization point and in the event the former were higher than the latter to add the difference to the delivered price quotation.

In many other respects the industry was characterized by deviation and variations in pricing practices. These variations in practices are brought out clearly in the allusions to them in the minutes of the various divisions of the lead pigment division.

Now, the recollection of the witnesses who were called and questioned regarding practices obtaining prior to 1933 was very vague, and it is only by inference that we can fill in the picture of what those practices were.

Following the passage of the National Industrial Recovery Act and in the summer of 1933, the respondents met together for the ostensible purpose of drafting a supplementary Code of Fair Competition for the lead pigment industry. I believe that every draft of a Code produced at these meetings appears in the record as an exhibit. So, it is possible to determine exactly the matter the respondents were placing in the drafts of their proposed Code of Fair Competition as the result of these lead pigment division meetings.

4212 It is my contention that at these meetings the respondents went far beyond their ostensible aim and purpose of drafting a supplementary code of fair competition, and undertook by agreement and combination completely to reorganize the prices and pricing practices in the lead pigment industry. In two of the principal items of the conspiracy, the so-called agency plan and the zone system, it is perfectly plain and apparent that it was never the intention of any of the respondents that these matters should be even referred to in any draft of the Code.

Now, as to what was done by the respondents at these meetings as the result of these meetings, the record is clear. The respondents discussed all of their various diversities of practice, and they had a meeting of the minds as the result of these meetings, and they put into practice and operation and into effect the pricing practices which they had agreed were desirable at the meetings.

There has been raised a principal issue by the respondents, that their activity during the period of the National Industrial Recovery Act in 1933 under the Schechter decision in 1935 are not subject to the Federal Trade Commission Act and that they cannot be held accountable for their actions during this period.

Well, now, let us examine this matter of any claims for exemption under the National Industrial Recovery

4213 Act. Section V of the N.I.R.A. contains the following provision:

"While this Title is in effect (or in the case of a license, while Section 4 (a) is in effect) and for sixty days thereafter, any code, agreement, or license approved, prescribed, or issued and in effect under this Title, and any action complying with the provisions thereof during such period, shall be exempt from the provisions of the antitrust laws of the United States."

The leading decision on the matter of exemption for cooperative activity during the Code period is the decision of the Supreme Court in *U. S.* v. *Socony-Vacuum Oil Company, et al.*, 310 U. S. 150. Other cases in which this question has been considered by the courts are *Dietzen Company, et al.*, v. *F.T.C.*, 142 Fed. (2d) 321; and, then, there was the so-called Cement case reported at 157 Fed. (2d).

Trial Examiner Norwood: Which Cement case is that, the last one?

Mr. Wright: The *Cement Institute* v. *Federal Trade Commission.*

Trial Examiner Norwood: Yes.

Mr. Wright: In the Dietzgen case the Court quotes:

"It may be argued that the N.R.A., being unconstitutional, never lefted the restrictions found in either anti-monopoly act. In other words, the N.R.A. was ineffective for all purposes. We are convinced that notwith-
4214 standing this fact, the Government was estopped to prosecute citizens who complied with N.R.A. codes, for violations of either the Sherman Antitrust or the F.T.C. Acts, because the N.R.A. was presumably valid until by judicial pronouncement it was declared to be invalid, and in this case invalidity was not determined until its unconstitutionality was decreed by the Supreme Court."

While in the Socony-Vacuum case the Court had held that there was one way and one way only that exemption from the antitrust laws could be secured for actions during N.R.A. and that was in strict accord with the exemption provisions of the statute, the Seventh Circuit sits up in the statement I have just read a form of constructive estoppal for actions done by the respondents pursuant to or in compliance with a code of fair competition.

All of the trade practice provisions of the Code of Fair Competition for the lead industry are contained in Article VII of that Code, which appears in the record as Commission's Exhibit 809. Section 1 of Article VII prohibits six different types of practices which are, with two possible exceptions, well recognized unfair methods of competition against which the Federal Trade Commission has proceeded in many instances: misbranding, misrepresentation, commercial bribery, inducing breach of contract, and making false and derogatory statements regarding a competitor. The two possible exceptions are the provisions of Article VII, paragraphs (d) and (f), relating to guaran-

tees of the life of service of lead pigments, and cer-
4215 tain forms of loss-leader selling.

Section 3 relates to the filing of monthly reports on production, inventory and shipments.

Now, there is nothing in either section 1 or section 2 which remotely affects the situation involved in this proceeding as far as I can ascertain. Any exemption which the respondents might claim under N.R.A. must be found in section 2 of Article VII, which reads as follows:

"Each member of the industry engaged in the manufacture and sale of lead pigments shall file with the secretary within ten days after the effective date of this Code, a list of the prices at which his products will be sold and a memorandum of any of his conditions of sale at variance with those set forth in schedule A attached and which is made a part hereof. Any change in price or conditions of sale shall be reported to the secretary in such manner as to reach his office within 24 hours after the effective date of such change. Any member making a sale or quotation, which does not conform to the basis he then has on file, shall notify the secretary in detail by letter mailed within 24 hours. The information supplied the secretary shall be reissued immediately to the reporting members."

It will be noted particularly that the code provision in section 2 does not require adherence to the terms and con-
ditions of sale set forth in the three articles of sched-
4216 ule A, and recognizes the right of any producer to vary these terms and conditions and depart from them to any extent he sees fit, or indeed wholly to disregard them, provided only that he advises the Code Authority to the effect. Thus, the only requirement of section 2 is the filing of prices and a listing of variations from the terms and conditions of sale.

It is perfectly plain from a reading of the minutes of the meetings of the Lead Pigment Division—both the Dry Products Committee and the Oxides Committee—that the respondents were not seeking in those meetings to outline standards of quoting, but they were in fact discussing the advisability of adopting for use and employment by themselves of the methods and terms and conditions of sale which were discussed at those meetings.

Nowhere in the Code, even by the broadest stretch of inference, is there any authority for agreement by the respondents to adopt the various zones and the differentials

applicable thereto; to adopt agency contracts; to adopt uniform cash and quantity discounts and container differentials; or to adopt a uniform method of quoting the differentials over pig lead.

Most of these things had no mention in any draft of the Code and those of them that were mentioned were not mandatory on the respondents under the Code. Hence, adoption by the respondents of any of these matters which were discussed and agreed upon at the meetings can-
4217 not be characterized as "an action complying with the provisions thereof"—

Trial Examiner Norwood: Well, Mr. Wright, are you contending that they were not privileged to discuss every possible subject in a meeting that might be suggested to determine what they were to recommend go into the Code?

Mr. Wright: Well, sir, my point there is that there are appearing in the record drafts of the supplementary code for the lead pigment industry, from the first draft to the final approved Code, which is Commission's Exhibit 809; and that in none of these drafts was there any requirement of adoption of these matters, so that under the literal terms of Section 5, there can be no exemption for agreements reached because they were not agreements in compliance with any provision of the Code.

Now, as to this constructive estoppal that the Court brings up in the Dietzgen case: I am assuming now that the purpose of this constructive estoppal is, as the Court went into more detail about it in its decision in the Cement case, to prevent businessmen from being misled by the Government into coming in and fixing prices on the erroneous assumption that they had an exemption from the antitrust laws, and then have the Government turn around and prosecute them for a violation.

The record in this case is perfectly plain that these respondents were operating under no such illusion that they were invited by the Government to fix the prices.
4218 That is perfectly plain from the exhibits in the record. As a matter of fact, following one of the Lead Pigment Division meetings of the Dry Products Committee on October 27, where the minutes show that the question was discussed of the possibility of adopting the provisions of the supplementary code for the Pigment Division immediately rather than waiting for the approval of the President, the secretary was directed to procure a legal

opinion to ascertain whether this would be in violation of the antitrust laws. There is the first indication that the respondents were aware that they had no blanket exemption under the N.R.A.

Commission's Exhibit 522 is a letter from Mr. Wormser, secretary of the Association. Having carried out his direction in the minutes of October 27, he wrote Mr. Carter, the president of National and the chairman of the Dry Products Committee, as follows:

"I called on Mr. Locke this afternoon to obtain his opinion with respect to the legality of immediately installing a uniform basis of sale for the lead oxides and dry products by agreement among the producers. Mr. Locke read the supplementary code provisions, article II, and also the suggested outlines of the uniform basis for sale. Although he noted that stipulations as to price had been omitted from the outlines"—

May I interrupt my quotation at that point to refer
4219 back to the previous minute, where it was agreed as stated in the minute that out of deference to the antitrust statute no reference of price would be made in the Code. To continue the quotation:

"He felt that it might be unsafe to have an agreement prior to the approval of our Code as factors other than price in the uniform sales contracts might possibly be picked up by the authorities as having a bearing on price and hence being in restraint of trade. He suggested that the best practical solution for the moment seemed to be the adoption of the uniform basis of sale by one or more of the interested members, which could be followed voluntarily by the others, without agreement on the subject but merely because it was individually to their best interests to do so. I wired you the substance of Mr. Locke's views for no doubt you will wish to discuss the subject further with the other members who now happen to be in Chicago."

Now, there are other exhibits in the record in the form of letters from Mr. Carter to other producers confirming the subject of this correspondence and indicating that it was this procedure that the respondents had in mind.

Getting back to the Code now, it was the testimony of Mr. Wormser, the secretary of the association when he was called on behalf of the respondents, that section 2 of Article VII of the code, of which Schedule A is a part, was
4220 never effective, and that the respondents had secured

exemptions from this provision of the Code during the whole life of the N.R.A.

Thus, while there were limited Code provisions affecting the marketing of lead pigment, they related only to a basis for filing a price which was never done, as far as the record shows; and the Code provisions, limited as they were, were never made effective. Thus, no action of the respondents during this period could have been in compliance with the Code pursuant to section 5.

All through the minutes of the meetings and the correspondence between the parties, we see an awareness of their duties and responsibilities under the antitrust act. We see them discussing every phase of the marketing of these various lead pigments. As to some of the phases which they discussed the reasons for the suggested changes were made plain.

Mr. Carter of the National Lead Company was very frank in his letter to Mr. Richter, the manager of duPont, when he was discussing a meeting of the white lead-in-oil committee early in August and early in September, that the agreement on the adoption of the agency plan was for the purpose of controlling the price of white lead-in-oil in the hands of the dealers and distributors.

The purpose of the respondents as to agency appears plain also from the minutes of the meeting of August 9 of the white lead-in-oil committee, where it was stated
4221 that adoption of the agency plan would take care of such matters as guarantee of price, spring datings, deviations from terms, and the like. In other words, it was the purpose by the adoption of an agency plan to rectify and control all the previous troublesome deviations and variations which had obtained in the white lead-in-oil business except the matter of zone which, of course, could not be taken care of in the agency plan.

Now, how can it be stated that following the frank discussion which appears in the minutes of the white lead-in-oil committee on August 9 and subsequently, and the statements which appeared in Mr. Maston's letter and Mr. Carter's letter of the discussions of the advisability of putting this agency plan in effect and showing an interchange of information between the respondents as to what they were doing in this matter, followed by a simultaneous announcement on the 15th of November by National and Eagle, the principal producers, putting the thing into effect

in a substantially identical form and manner—can it be said that that is independent action?

The same is true of the zone system. Here was a method which admittedly was a very troublesome and cumbersome method of marketing. As Mr. Maston said, you could never be sure as to what points were equalization points, and there was other difficulty that was a matter of common knowledge. Following the frank discussion of the benefits which would flow from common use of this zone
4222 system, overnight the zone system appears.

It is uncontroverted that it went into effect sometime immediately following these discussions by the respondents. Is it reasonable to suppose that there was no meeting of the minds of the respondents in their discussions as to these practices? It is my contention that it is more reasonable to suppose that the respondents in that and in other matters followed the advice which Mr. Wormser got from counsel and which he relayed to Mr. Carter in Commission's Exhibit 522, that there was to be no agreement but that following the discussion the respondents agreed that one company would announce the program and the others would follow. It is beyond argument that that constitutes an agreement under the cases.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: Proceed.

Mr. Wright: While the institution of the agency plan in white lead-in-oil and the various zone plans affecting all of the pigments are two of the outstanding matters on which agreement was reached at the time, and two which are plainly beyond the Code in any way even by inference, since they were not mentioned in any draft of the Code, there are still other matters on which the respondents reached an agreement.

It is significant of the radical changes in marketing
4223 practices which were adopted for dry products, the statements which appear in the letters of Mr. Harold Rowe to the branch managers of National under dates of May 11 and June 9, 1934, respondent's exhibits Nos. 159-A and subnumbers, wherein—

Trial Examiner Norwood: Now, those terms and conditions and so forth and the matter of pricing in relation to the lead market, weren't they covered by the Code?

Mr. Wright: As to that, your Honor, there appears in

Schedule A which is incorporated by reference into section 2 of Article VII—

Trial Examiner Norwood: Your proposal page 22?

Mr. Wright: Yes, sir. There are three articles in Schedule A. The first article relates to the conditions for sale of lead oxide in lots of less than 20 tons. Now, under "Price" in article 1 of Schedule A appears the provision: "Seller's card or quoted price in effect on date order is received with allowance as follows:

"1. Not more than ½-cent per pound for minimum shipment of 5 tons for one buyer at one time to one destination. • • •

"b. Emergency shipments of smaller quantities may be made at the 5 ton prices only to a customer for whom the seller has a 5 ton order on hand for immediate shipment or 5 tons en route to the same destination."

Also: "No protection against decline in seller's 4224 price may be given."

And then, there follows the customer differential—or rather, the differentials between grades of red lead.

A similar provision appears in article 2 on the carload oxide sales, except it sets out the price shall be determined by adding a differential to the price of common lead in New York, the lead price applying to each order to be specified by the buyer as (1) the A.S.&R. close of market quotation on the day the order is received, or (2) the A.S.&R. quotation at the close of the market on a future date definitely agreed upon by buyer and seller when order is accepted, or (3) an average quotation which could be secured either from the Engineering and Mining Journal or the American Metal Market.

Now, the base price in those two provisions is not touched upon in the Code but every addition to the base price is touched upon. Quantity discounts is specified; exactly what the price quotations that must be used are is specified; and how it must be used is specified.

If you will recall, previous to the adoption of the Code the minutes of the Lead Pigment Division show that out of deference to the statute price will be omitted from the basis of sale. However, now, on May 11, 1934, which is approximately a month before this Code is approved, Harold Rowe, who was the principal representative of the National Lead Company at these discussions and a principal official, wrote to all these branch managers and he sent them

4225 a copy of this Schedule A, which apparently had been approved but not put into effect, and along with it he sent an interpretation of it to tell them what it meant, because some parts of it are necessarily obscure because the essential information is omitted.

Now, you will notice that the portion I read in article 1 of Schedule A on the less than carload quantities said, under "Price," that the price was agreed to be the seller's quoted price in effect; that no protection in decline against the seller's price may be given.

In the interpretation of that particular provision which appears in the attachments to Mr. Rowe's letter of May 11, the following is stated:

"All sellers have agreed to discontinue the old 90 day card price contracts. Firm orders will be accepted for shipment up to 30 days."

And, then, going on further under "Price":

"You will note that no protection against decline may be given. This is a point on which there was a great deal of discussion and it was finally decided to make a definite rule which is intended to mean that the price to apply to any order is that 'in effect on the date the order is received.'"

Now, doesn't that sound—

Trial Examiner Norwood: Pardon me. Those matters were incorporated in the Code, were they not?

4226 Mr. Wright: No, sir, the matters which the—

Trial Examiner Norwood: He was interrupting, wasn't he, the Code?

Mr. Wright: He is interpreting a provision of the Code which is incomplete in and of itself; but, as pointed out to you, this provision of the Code was never made effective.

Furthermore, this provision of the Code simply set up a standard of quoting so that a producer who varied from it would only report his variations from the Code. The Code, had it become effective, was not mandatory on any respondent to adopt any of these provisions, but they simply report any variations from it.

Trial Examiner Norwood: As I understand it, part of the Code was agreed upon and thereafter it was ineffective, and in the meantime one of the members put it out on his own motion. Is that right?

Mr. Wright: We are referring now to a document of National?

Trial Examiner Norwood: Yes.

Mr. Wright: But, it is my contention, and I think the record is plain, that what National did all the respondents did.

Trial Examiner Norwood: I just wanted to fit this into the picture. He sent that out prior to adoption, sent out his own interpretation around with it, to his own
4227 people, is that right?

Mr. DuBose: To the branch managers of National Lead Company.

Trial Examiner Norwood: Yes.

Mr. Wright: And I am pointing this out, your Honor, to show what is meant by some of these provisions in article 1, and also to show that these respondents were agreeing to put these things into practice, not agreeing upon a standard of pricing quotations for which the Code provides.

There is a statement that all sellers agreed to discontinue the old 90 day card price contracts; and there is a further statement that "this is a point on which there was a great deal of discussion and then it was finally decided to make a definite rule which is intended to mean that the price to apply to any order is that" and it quotes—" 'in effect on the date the order is received.' "

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: We will take a five-minutes' recess.

(A recess was taken.)

Trial Examiner Norwood: Resume.

Mr. Wright: Now, to continue with the so-called interpretation of Schedule A by Mr. Harold Rowe on May 11,
1934, in both of the interpretations, that of article 1
4228 and of article 2, there is included a description of the zones and territories of differential.

Trial Examiner Norwood: What exhibit is that?

Mr. Wright: Respondent's Exhibit 159-A to -J. I am speaking now specifically about -D, -E of 159.

Nowhere in Schedule A does there appear anything about zones nor does it appear in any other part of the Code. But, interpreting Schedule A on the less than carload red lead and litharge, Mr. Rowe advises as follows:

"In the following States the card prices will be ½-cent a pound higher than those shown on the card enclosed," and then he lists Southern and Western States, as substan-

tially alleged in the complaint in that regard, with the remark in parentheses that the schedule for states served by Pacific Coast were not yet determined.

Later on, June 9, when he sent his supplemental instructions to the branch managers, he states that since that date, referring to May 11, the zone differentials for oxides in the territory served by the Pacific Coast have been determined and a change has been made in New Mexico, Colorado, Wyoming, Montana, applying to less than carload lots.

Then he goes on to state that on dry white lead there has been also a change from the original 4 cents added to the par price in those four states.

The same is true of the 20 ton lot interpretation.

4229 There the various differentials in certain states as alleged in the complaint are set forth in interpreting that schedule.

Trial Examiner Norwood: Does the schedule say the differentials shall be agreed upon between buyer and seller?

Mr. Wright: No, sir, the final-draft provisions of schedule A on the less than carload oxides and on dry white lead specified prices as being seller's card or quoted price on the carload and the differential was on that.

Mr. DuBose: As agreed upon by buyer and seller.

Mr. Wright: I will stand corrected. In the carload red lead and litharge it is agreed upon by buyer and seller at differential figures.

You will recall that they said, "agreed upon" but was placed in "out of deference to the statute," but in the instructions under date of May 11 Mr. Rowe stated as to these differentials that the differentials that will apply to 20 ton lots will be as follows in par territory: $1.50 for litharge and special negative battery oxide; $1.75 for special positive battery oxide.

You will recall that that is a litharge containing 25 per cent red lead; up to and including 95 per cent it is $2.50 for red lead. In other words, in interpreting article 2 of Schedule A, Mr. Rowe sets forth those differentials.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

4230 Trial Examiner Norwood: On the record. That differential is over common lead? It is over common pig?

Mr. Wright: Over common pig lead, yes, sir.

You will recall, your Honor, the testimony by the dry products representatives of Eagle-Picher and National as to the relationship which has existed between the New York price of pig lead and both the card price on less than 5 ton lot and the differential price on carload lot, where there is an automatic following of the card price; where the pig lead market in New York moved by as much as 25 cents the card price is automatically changed up or down in the same amount, and the carload quotations move up or down correspondingly in multiples of 5 cents cwt.

Trial Examiner Norwood: Read that last statement, please.

(Statement referred to was read by the reporter.)

Mr. Wright: Except as to the position of Sherwin-Williams there is no issue in the record as to the use of the zone system from the time of the discussion of these matters in the Lead Pigment Division and the present date.

There is no question either that it has been general practice of the principal producers of red lead and litharge to follow the terms and conditions of sale as were set forth in Schedule A from that time to the present.

Now, Sherwin-Williams states that it has not em-
4231 ployed the zone system, and relies on the testimony of the witnesses that it was the company policy to sell on a system of warehouse differential points which resembles in many respects the system which obtained prior to the Code period.

It is my contention that a reading of the record will disclose that what is stated as the company's policy is in fact an exception to it and that the position as stated is analogous to describing a black cat with a white tip on his tail as a white cat except for most of his tail and all of the rest of his body.

It is the Sherwin-Williams Company's general policy to follow a system of warehousing differential points, except where lead pigments are included in what is described as a carload but which is in fact a truckload order of as little as 10,000 pounds; except in sales from its company-owned store; except where there is a considerable volume of business in some town away from one of its so-called shipping points; except where there is competition from the other respondents requiring them to meet the zone system. All of the warehouse and distribution points or

shipping points coincide with the zones themselves as employed by Sherwin-Williams.

The following of the zones on red lead and litharge by Sherwin-Williams is set forth on Commission's Exhibit 823 which details the zones in the same fashion as was set forth by the other respondents in their comparable
4232 instructions to branches and announcements to the trade.

Trial Examiner Norwood: Now, is that the first map in your proposals?

Mr. Wright: No, sir. The thing that I am now referring to is the fourth map in the proposal, less than carload red lead and litharge zone map.

Trial Examiner Norwood: And your citation in connection with that is Commission's Exhibit what?—referring to Sherwin-Williams?

Mr. Wright: I am referring to Sherwin-Williams' announcement in that respect in Commission's Exhibit 823-C, -D, -E and -F.

Trial Examiner Norwood: I should like to have references in connection with these four maps.

Mr. Wright: Well, your Honor, in connection with those maps, as stated therein—there are a number of maps in the record, beginning with the earliest one which was submitted by Mr. Maston as chairman of the White Lead-in-Oil Committee and running down to the discussions of the zones and territories as late as 1941 and 1942. From time to time there were some diversities in practice. The maps which appear in my proposed conclusions, the white lead-in-oil cake products zone map is taken from a similar zone map which was offered in evidence by the respondent National as Respondent's Exhibit 147.

The difficulty with the white lead-in-oil zone map
4233 is that there have been from time to time certain minor changes in territory, particularly in cities which were located on or near the borderline of the zones.

Substantially, this map is the map which we contend has been used since the time of the Code days, from 1933 to 1934. Glidden has not used a comparable map. Glidden has followed the zone system by describing in detail and literally the territory within each zone — but that is Tweedle-Deeing and Tweedle-Dumming. The use of the map is not the gravamen here, it is the use of the system itself, and however they describe the zone, whether by maps or by geographical areas, it is the same.

Trial Examiner Norwood: The object of my question was to secure these references to each map so that if I should find them correct and wish to use them in my report, I can enter these references to the exhibits and have them photostated right into the face of the map that I use.

Mr. Wright: I wanted to supply your Honor and counsel for the respondents with a list of all citations of various maps and descriptions of territory that appear in the record.

I might say that the only difficulty is as to the white lead-in-oil map. My contention is that the dry white lead zone map has been used without change and that the carload and less than carload red lead and litharge maps
4234 have been used with one change, and I want to state at this time that the record shows that sometime in 1942—the exact date of which can not be ascertained—

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. Wright: The States of Arkansas and Oklahoma on red lead and litharge, which appear on these maps here as being in the premium zone, were made into the par zone. These maps as they appear in here are an attempt to reflect the situation as it existed from the time the conspiracy was initiated down to 1941 or 1942. I wanted to make that explanation since I do not recall that I covered it particularly in my proposed findings.

But, with that exception on the red lead and litharge maps and with the explanation on the white lead-in-oil map, they are substantially as have been announced.

Now, it is my contention that these practices which were so fully discussed by the respondents at these meetings and which were put in operation immediately following and made effective, have been followed over since in substantial form.

It is not necessary—since I cannot say that they have not been deviated from—it is not necessary to prove this conspiracy so as to show an absolute, 100 per cent, literal compliance. That would be beyond the realm of possibility.

4235 It is my contention that through the zone system and through the common adoption and common use of this differential method of quoting over A.S.&R. New York spot quotations or spot carload quotations and on

average prices on average price contracts, and through the fixed relationship of card price to that same price, that the respondents put into operation in the 1933 to 1934 period a system and a mechanics of price fixing which has been employed by them ever since.

It was not necessary at the expiration of N.R.A. for the respondents here, as with the respondents, for instance, in the Dietzgen case which the Circuit Court discusses in the opinion I have cited before, to make a resolution to continue complying with the practices covered by the Code. The Code was never effected. The principal parts of the respondents' conspiracy never found their way into the Code and such a resolution would have been surplusage. It has been a system which is self-perpetuating. It is necessary for the respondents only to know one factor as to any product, and they know then exactly what every other respondent is doing. Knowing the price of pig lead as quoted by American Smelting and Refining Company in New York, every respondent knows what the quotation is going to be to any customer in the United States on red lead and litharge; knowing a change in the price quotation in the par zone on white lead-in-oil or dry white lead, each respondent knows exactly what the quotation is going
4236 to be to any customer by any company at any point in the whole United States.

It is a system which has required no cooperative nurturing and fostering in the sense of continual meetings and cooperation over the elements of the system. It has not been necessary. It was put into operation as a self-perpetuating scheme and it has been followed by the respondents ever since that time.

Now, there has been some diversity. Some of the respondents, for instance, have quoted white lead-in-oil at differentials to dealers and distributors below that of the National Lead Company. That was explained by one of the witnesses as being a form of extra compensation to the dealer to enlist his support of a lesser-known brand along with the Dutch Boy brand. In every instance the suggested resale price to consumers and to painters by all of the respondents was identical. That differential as employed on white lead-in-oil never found its way to the consuming public. It took the form of a little bribe to the dealer for handling a lesser-known brand. Eagle-Picher did it with its Hammer brand but it was not neces-

sary to do it with the Eagle brand which was sold at the same price as National.

Trial Examiner Norwood: Well, was it any more than a suggested retail price be maintained on final sales to buyers, and does that reflect this dealer reduction?

4237 Mr. Wright: According to—let me answer that in this way. A great deal of white lead-in-oil sold during this period was sold under consignment contract arrangement, so that the price at which the dealer or agent sold was absolutely fixed and controlled by the respondent. The dealer had no choice. The dealer could not reflect any price difference to the public.

And, the other sales by the respondents, for instance, now, the other sales by the respondents who did not adopt consignment or who used it only for a limited period, were under price cards and announcements and instructions to the dealer to resell the product at the price stated.

Trial Examiner Norwood: Well, were those differentials given to these consignees?

Mr. Wright: Yes, sir, the record shows that. The record shows that the differentials were given to the consignees, and it is a matter of presumption that those agency contracts at least were lived up to and, by the same token, it is a matter of presumption that at least a substantial part of the sales under suggested resale price instructions to the dealers were made in accordance with those price instructions.

There are two other instances of diversities in practice, one of them in the sales particularly by National and Eagle-Picher of red lead and litharge to some very large battery manufacturers, and there are some transac-

4238 tions in the record which show a shrinkage of the general and normal differential under the price of pig lead.

Trial Examiner Norwood: But, was the shrinkage equal?

Mr. Wright: No. There are some instances in the record where there appear to be genuine competitive prices in the sales to some of the very large battery manufacturers. It is my contention that that is accounted for by what stands uncontroverted in the record, the ability of the very large battery manufacturers to produce their own oxide if the price was not one to suit them.

There is one other point of diversity, and that is in the

Government bid to three federal agencies. Your Honor will recall that in the first meeting—or, earlier, you will recall that in one of the early white lead-in-oil committee meetings, that of August 9, 1933, the respondents took up that matter of bids to government agencies.

The minutes, Commission's Exhibit 501-C, contain the following:

"The question of open quotations on Government and State business was thoroughly discussed. Any plan to eliminate excessively low bids would be helpful to the entire industry."

And, they considered the possibility of apportioning such business; that was discussed. There was a difference of opinion as to methods which might be used, the following being suggested: capacity; last year's government
4239 and state business; average last three years' government and state business; average last ten years' government and state business.

There is nothing further in the minutes on this matter, and there is no further evidence that any such agreement was reached. In their announcements to branches, sales personnel, most of the respondents have outlined exactly the method that should be followed in quoting on government and state business, and that method was strictly in accordance with the system—use of the zone and use of the other various pricing practices which we contend were adopted by agreement.

Trial Examiner Norwood: Were their instructions to their dealers similar with respect to that bidding?

Mr. Wright: There are no instructions to dealers that I recall on bidding on government business, your Honor.

Trial Examiner Norwood: Sherwin-Williams Company issued an instruction about government bidding.

Mr. Wright: I don't recall.

Trial Examiner Norwood: Now, is there anything else in the record like that?

Mr. Wright: Commission's Exhibit 615, I believe it is, is a long document by the National Lead Company dated, I believe, in January 1942.

Mr. DuBose: April 26, 1941.

Mr. Wright: April 26, 1941, and it sets out in detail the methods to be employed in quoting government
4240 agencies and state governments and railroads and others. It is a document which, I understand, was submitted to the branches as an instruction, in type.

There is evidence in the record in the form of bids to the Cities of Cincinnati and Milwaukee showing identical bids which follow out the method and the system employed by the respondents.

Now, assuming that the bids to the Federal agencies were strictly competitive and not the result of any prearrangement and where there is evidence of competition as to those bids, as with these three agencies, still that does not detract from the conspiracy which has been followed out in substantial form in doing business with every other class of customer.

Trial Examiner Norwood: Well, I have some citations here, I think set out in National's proposals showing a table; could you give me the citations of those bids which you say are identical?

Mr. Wright: Yes, sir, Commission's Exhibits 864 and 865.

Mr. DuBose: Those are Milwaukee and—

Mr. Wright: And Cincinnati.

Trial Examiner Norwood: Off the record a minute.

(Discussion off the record.)

Trial Examiner Norwood: Proceed on the record.

Mr. Wright: It is my further contention that the 4241 National Lead Company has assumed a position of dominance in the industry directly through the practice of acquiring its competitors. While the bulk of such acquisitions were accomplished a great many years ago, there have been several important acquisitions within the period with which we are concerned, and the record shows in uncontroverted form that it was National's intention for a period of years in the early 1930's to acquire control of the respondent Eagle-Picher, the second largest factory in the industry.

The effect of such acquisition by National on the lead pigments industry is obvious. It would leave the National Lead Company in an absolute monopoly position so that there would be no freedom of choice on the part of any other person in the industry.

There was considerable testimony by witnesses representing other respondents as following National, at which time Mr. Sprague, the vice president of Glidden, referred to National's price as the ceiling price in the industry.

Since the means by which National has secured its present position is one of acquisition and abandonment of pro-

ductive facilities in most instances, I strongly urge a finding to that effect and conclusions in the proposed order against any further acquisitions by National of any of the assets or capital stock of any competitor engaged in the lead-pigment industry either in sale, distribution, or manufacture.

4242 As to discrimination—the system employed by the respondents is essentially discriminatory. As pointed out in more detail in my proposed findings on pages 33, 34 and 35, the actual sales revenue of the respondents on red lead and litharge is a very narrow one, amounting in the case of litharge in carload quantities to less than two dollars cwt.

Yet, each of them is willing to quote prices and hold himself out to sell at shipping point prices which shrink that net margin by more than 25 per cent. Each of the respondents realizes his largest net sales return from those customers located in his own factory town. For the reciprocal and mutual privilege of being able to sell in the factory and producing areas in which its competitors have a freight advantage, he is willing to maintain a similarly high net sales price in his own freight-advantage territory.

The so-called delivered prices of the respondents are really not prices, they are simply quotations announced in advance of their willingness and intention to sell, conveniently framed in the zone method so that each can be sure to match the similar quotation of the other to any customer located at any point.

It is my contention that price must be considered as the price received at shipping point by the seller and after the deduction of transportation. In a great many instances, according to the record, that is the actual method of

4243 conducting the transaction, the goods being shipped freight collect and the buyer taking title at the seller's shipping point.

In the various drafts of the Code, including the final draft of the Code, the respondents themselves set forth that the delivery is to be made at the seller's shipping point. The so-called zone differential added to the delivered price quotations have the effect or purportedly have the effect of recouping transportation charges but in dealing with distant customers do not reflect the changes and variations in shipping point prices received by the respondents from those customers, as more specifically set forth in the proposed findings and conclusions.

Your Honor will note carefully the testimony of the numerous small-battery manufacturers who were called as witnesses in this proceeding. There is no conflict in the record about the competitive situation which existed in the manufacture and sale of electric storage batteries during the period of the 30's. Witness after witness engaged in the industry testified that it was characterized by extreme price competition. Representatives of the respondents likewise testified from their contact with the battery industry that it is a highly competitive one.

It is composed of more than 200 different manufacturers ranging in size from very large multiple plant producers to small one-man enterprises who produce 50 batteries a day.

4244 A good many of these smaller customers were located in the factory towns of the respondents, in Chicago and in St. Louis. Two of them, I believe, were in Joplin, Missouri. These witnesses testified that companies who were shown in the record to have been sold battery oxide by the respondents located at considerable distances from the producer's plant, they showed that the respondents received a great shrinkage in their net shipping point prices, shipped batteries back into those producing localities where the respondents are located and contributed greatly to the competitive distress of those small manufacturers during the period of the 1930's.

The record shows that the cost of lead pigment used in producing a storage battery amounts to approximately 30 or 33 per cent of the total material cost in such a battery. A normal small battery requires from 10 to 12 ponds of red lead and litharge in the manufacture of the plates in the battery. Thus, a discrimination of a half-cent a pound or 50 cents cwt. against the small manufacturer amounts to 5 cents per battery in his material cost.

These respondents were perfectly willing to ship from St. Louis to Niagara Falls, New York, or to Minneapolis or to other distant points and absorb approximately a half-cent from their carload price in selling to these large battery manufacturers; yet, from a small man to whom a delivery is made in company-owned truck located in

4245 the same city, the highest possible net price is secured.

Now, such a situation as that I have referred to, such discrimination, is inherent in the zone system, which is

discrimination for the purpose of and with the effect of enabling the respondents to suppress and eliminate competition between and among themselves; and it is heightened and added to by the gross discrimination apparent in the quantity discounts and the different quantity bases of selling red lead and litharge as between the carload lot and the 5 ton and the less than 5 ton purchasers.

Trial Examiner Norwood: Now, if I understand you, you contend that the differential between the zones hit the small battery man, and you have set out there was a differential of a half-cent for less than 5 tons, or something like that. Now, there were other differentials to be added to that half-cent?

Mr. Wright: Perhaps I am not quite sure what you have in mind. There are really two separate types of discrimination. One is that inherent in the zone system through this method of systematically varying the shipping point prices which operates directly and immediately against the nearby customer and in favor of one more distantly located on a reciprocal basis.

Then, there is also unconnected with the zone system, the matter of these differentials which were set up by 4246 agreement back in the 1933 and 1934 period, although I am not contending that the agreement has anything to do with the legality of the less than 5 ton discount, providing in selling to a carload purchaser—in other words, a man who buys a 600 pound barrel of the material is to be sold it at $1.50 differential over the N.S.&R. price in New York; but if a man buys less than that, he buys on the card price.

Now, it is the testimony of witnesses by the respondent that card price is calculated at a difference of $2.50 instead of $1.50 over the price of New York pig lead. Now, those are the two categories, the carload and the less than carload. Now, the less than carload is divided into two categories. Generally speaking, the man that purchases less than 17 600-pound drums will pay one cent per pound, from .8 to 1 cent per pound more, simply because of the quantity he purchases, than the man who buys 65 or more drums; whereas the man who buys from 18 to 64 drums of 600 pounds will pay from .3 to ½-cent per pound more than the 65 or more drum purchaser.

I am contending that each of those is a violation of section 2 as set forth in count 2.

Trial Examiner Norwood: Have you set out any instances that are shown in the record as to these lead battery manufacturers? That is, you contend that selling on the zone price discriminates against these small man-
4247 ufacturers who were near the source of supply.

Mr. Wright: Yes, sir.

Trial Examiner Norwood: And then you contended that there were certain effects here which amount to practically one cent a pound as against the large manufacturer; have you set out with respect to any particular purchasers what it would all add to by way of a price difference?

Mr. Wright: Yes, sir. That is done to a certain extent at least on page 34 of the suggested findings, although I would like to point out to your Honor that the two things are not necessarily related.

My only point in connecting the two was to show cumulatively what I am maintaining and contend, namely, that the amount of discrimination as to either one is sufficient to injure competition in the storage battery industry in normal times substantially, that the combination of the two—and they can be and are combined since a great many of those small battery manufacturers are located in Chicago, in St. Louis and in other points where the respondents maintain factories, that when you add those two together, the net effect on competition in the battery industry is considerable.

I think the inherent discrimination in the zone method would amount to as much as one-half cent a pound or 5 cents a storage battery, whereas those on the quantity basis amount to as much as one cent a pound or 10
4248 cents on a storage battery; and it was testified to that this matter of from 5 cents to 10 cents in saving of material cost to producers of storage batteries, your Honor will recall, is a very important matter in times of normal competition.

The arbitrary nature of the system is well set out by the situation existing in Dallas, where National operates its own producing plant; in every instance in selling it adds 25 cents per cwt. for delivery to a customer located right in the City of Dallas, and that customer is in competition—being the Vitalit Company—with large manufacturers back in the par zone who are not forced and required to pay that ½-cent per pound zone differential added to the price but as to whom National also shrinks its shipping price by a considerable amount in addition to that.

A similar direct effect on competition, discriminating against a customer located in a producing and factory point of the respondents is well brought out in the testimony of the St. Louis Paint Manufacturers, which your Honor will recall. Some of it is set out in detail on pages 38, 39 and 40 of the suggested findings.

Trial Examiner Norwood: Well, as I recall it now, that evidence, they testified, some of them, that a few cents would not make any difference, and some said 5 cents would make a big difference, and so would 10 cents, and so on.

I just want to know the counsel's contention as to
4249 what the evidence shows as to the amounts of price difference, as to the price difference against these particular people, whether it amounted to 10 cents or what. I am not sure the record is clear.

Mr. Wright: Well, your Honor, I will say in that respect that there are a large number of invoices of Eagle-Picher Company particularly, showing their sales to customers, manufacturers located in the areas, about which those in St. Louis customers were questioned.

There is evidence in the record showing sales by the National Lead Company to that area and there is evidence showing in practically every case the exact freight rate which was involved.

Now, in every instance the amount of the freight rate from the shipping point is the amount of the discrimination less whatever transportation cost might be shown in the cartage in dealing with the local customer, so that the discrimination follows directly the transportation cost.

Your Honor will note in shipping from St. Louis down to those points in Texas that freight rates in some instances amounted to as much as one dollar per cwt., which would be one cent a pound.

Trial Examiner Norwood: Well, if charged a half-cent more down in Texas, wouldn't that lessen the discrimination by that?

4250 Mr. Wright: Well, it is my contention that if in that particular instance the local customer were given the benefit of his location in the form of a price which was at or near the price that the respondents were willing to accept from a distant customer, the effect of that would be to give that customer the normal benefit of his location and to remove the discrimination against him by reason of his location.

As I stated earlier, I am not in the position to take up in detail the various suggested findings and conclusions by individual respondents. I appreciate your Honor's offer of more time in which to submit further representations regarding those and I shall undertake to do that as expeditiously as possible.

Trial Examiner Norwood: I think it would be constructive to give us a draft of an order which you think or which you contend should be issued.

Mr. Wright: Your Honor, I will be happy at this time to outline an order, but I fully intended within the next few days to prepare a detailed form of order, draft of order, which I shall be happy to file with you and also make available to other counsel in this matter.

It is my contention that the findings will support the entry of an order to cease and desist which will run against a planned course of action, agreements, conspiracy to use or maintain or continue the various practices which
4251 are set out in more detail in the proposed findings as having been agreed upon in the 1933-1934 period and followed by the respondents continuously since that time.

I believe that an order should be entered which will prevent National from securing any interest, directly or indirectly, in the control of the physical assets or properties or capital stock of any concern or enterprise engaged in the sale, manufacture or distribution of lead pigments.

I believe that the record warrants the entry of an order which will require the respondents to cease from systematic price discrimination in the form of shipping point prices as is inherent in the zone system.

I believe also that the record will warrant an order against each of the respondents except as encountered in International which is not engaged in the sale of red lead and litharge against the discriminations inherent in the quantity differential basis of sale of red lead and litharge.

As I say, I am only outlining this at the present time and I should like to submit very shortly a proposed form of order in detailed form and also to submit further representations regarding the findings and conclusions as submitted by the various respondents.

I would like also to have the privilege of urging further citations of evidence in support of the contentions in the proposed findings and conclusions because I have not
4252 had an opportunity to cite all of the evidence which

appears in the record in support of the various contentions.

At this point I would like to state that there are three errors that I know of now in my statement of proposed findings and conclusions which I should like to correct, if counsel will bear with me.

On page 29 in the next to the last line in the paragraph in the middle of the page, where there is a statement, "including other agencies," running into the next line, the word "government" is to be inserted between "other" and "agencies."

On page 34 in the last line of the first full paragraph after the figure "$.10" insert "per battery."

On page 36 in the paragraph in which the various companies are listed in the center of the page, in the line above the line with the colon, change "arrangements" to "area."

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: We will recess until 2:00.

(Whereupon, at 12:30 p.m., January 7, 1948, a recess was taken to 2 p.m., this date.)

4253 Afternoon Session.

2:20 p.m.

Trial Examiner Norwood: Come to order. Proceed.

Argument by Mr. Gardiner.

Mr. Gardiner: The respondent, the International Smelting and Refining Company, has filed certain proposed findings, conclusions and reasons therefor with your Honor, and has cited in those findings and conclusions portions of the record which it is believed bear out the request that those findings are proper and the conclusions correct.

It does not seem to me that much is to be gained by my repeating the substance of those proposed findings. Your Honor has it, and I do not wish to burden the record at this point with a repetition of the same.

However, I would like to say in substance that the position of the respondent International is that there has been no showing on the part of the Commission, and there is no

evidence in the record, of any conspiracy as alleged in the amended complaint, so far as that respondent is concerned.

That would seem to be borne out to a certain extent by the discussion this morning by counsel for the Commission.

It was stated on several occasions, and it is contained in the Commission's proposed findings and conclusions, or rather in counsel for the Commission's proposed
4254 findings and conclusions, that the conspiracy stems from agreements or conversations and discussions which took place during the years 1933 and 1934.

A very quick answer to that, so far as the International is concerned, is the fact that the record distinctly shows, without any doubt, that so far as the zone system for the sale of dry white lead was concerned that was not adopted or followed by International until October of 1935, which is a year after the period during which the counsel for the Commission contends that this conspiracy was instituted.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: Go ahead.

Mr. Gardiner: The contention is also that the zone system, so far as lead-in-oil was concerned, stems from the same series of meetings and conferences during 1934 and 1933. There again the record shows, so far as International is concerned, that it did not adopt the zone system so far as the sale of lead-in-oil is concerned until January 1, 1937, a period of three years—at least three years and possibly four years—beyond the time at which the Commission contends or that counsel for the Commission contends this agreement was reached.

Trial Examiner Norwood: That is for white lead-in-oil?

4255 Mr. Gardiner: Yes, your Honor.

Trial Examiner Norwood: Go ahead.

Mr. Gardiner: Now, it seems difficult to—

Trial Examiner Norwood: January?

Mr. Gardiner: January 7, 1937.

I might say at this point, your Honor, that it is my intention, if I have sufficient time, as I have indicated I hope I may have, to point out to your Honor these fallacies of these contentions as far as counsel for the Commission is concerned by citations to the record bearing out my statement that the zone systems were not adopted until those dates.

The position of the respondent International, so far as discrimination is concerned, is that it has sold, during the time in which it was selling the lead pigments which it produced, to the class of customers at the same price and has treated them exactly the same. As to any differential, so far as quantities were concerned, the same differentials were made to the customers of that class.

And, for that reason, it contends that there has been no discrimination so far as the sale of its products are concerned.

The record, of course, shows that International respondent, while engaged in the manufacture and sale of dry white lead and lead-in-oil from the years 1936 to 1945,
4256 is no longer in that business, has sold its plant where these materials were produced, and has no intention of going back into that business—that is, no present intention.

Trial Examiner Norwood: It sold its plant in 1940 something?

Mr. Gardiner: October 1, 1945.

Mr. Ewing: 1946.

Mr. Gardiner: I'm sorry, your Honor, it was October 1, 1946.

The respondent Anaconda has filed its proposed findings and conclusions and reasons in support thereof, and again I see no particular point in going over those except to point out again the position that we have taken all along, that the respondent Anaconda Copper Mining Company has never been in the business of the manufacture or sale of any of the lead pigments covered by this complaint.

Your honor will find in the conclusions in those proposed findings citations to authorities which bear out the generally-acknowledged principle that a parent corporation is not responsible for the acts of its subsidiary merely by the fact that it owns all of the stock and that some of the officers or all of the officers are similar.

Now, I would like to take up a few points in the findings of the Commission which I think are in error, and again these will be pointed out at a later date if I have the
4257 opportunity to get up a supplemental statement on that point.

It is my understanding this was an action involving the production and sale of lead pigments. I therefore see very little reason for any proposed finding which reads that

Anaconda is one of the world's largest producers and fabricators of non-ferrous metals, including copper and zinc.

That seems wholly irrelevant. There is no citation to that. I assume it is in the record some place. But as to whether or not the Anaconda respondent produces copper in large quantities does not seem pertinent to this discussion or to the findings of your Honor.

There is a further statement that Anaconda is still engaged in the production of zinc oxide. There is no citation in the record to that point, and there counsel for the Commission may have concluded from the fact that the International Smelting and Refining Company at one time produced zinc oxide that it still does so.

I do not think the record is clear on that point. But, the plant which was sold by International at East Chicago, Indiana on October 1, 1946 was the only property of International where zinc oxide was produced, and that was sold along with the part of the property which produced lead-in-oil and dry white lead. There is no other property of Anaconda which produces zinc oxide.

4258 On page 17 of counsel for the Commission's proposed findings, there is a statement to the effect that on November 9, 1933, Carter wrote to Paul Sprague of Glidden sending copies to officials of Eagle-Picher, Sherwin-Williams, et cetera, and refers to Commission's Exhibit 523.

Examination of Commission's Exhibit 523 will show that copies were sent to certain named individuals, one of whom was a Mr. F. O. Case. Mr. F. O. Case in 1933, as shown by the record, was an employee of International and was not connected with Anaconda.

Trial Examiner Norwood: Is that a statement in the Commission's proposals?

Mr. Gardiner: Yes, your Honor, on page 17.

Trial Examiner Norwood: Now, where is that statement?

Mr. Gardiner: It is the third paragraph from the top of the page, beginning, "On November 9, 1933 Carter wrote," et cetera.

Trial Examiner Norwood: That should be "International" instead of "Anaconda"?

Mr. Gardiner: Well, the person named there is Mr. Case, and the record shows at the time that he was a sales manager for International.

Trial Examiner Norwood: Very well.

Mr. Gardiner: On the top of page 22 of counsel for the Commission's proposed findings, it is stated that
4259 National and Eagle-Picher adopted and put into effect an agency arrangement on November 15, 1933, following the discussions of the white lead-in-oil committee and the correspondence about it with their competitors.

The paragraph below there reads, "The record indicates that Anaconda adopted the so-called agency arrangement at about the same time and continued thereafter to market approximately 50 per cent of its white lead-in-oil by this means."

I would like to point out, your Honor, that the International's predecessor, Anaconda Lead Products Company, adopted what it has described or what has been described as a consignment arrangement in 1932; that neither the Anaconda Lead Products Company, which preceded International, nor International have ever adopted or sold by an agency arrangement. The record sustains that point amply, and citations will be made to that if the time permits.

Trial Examiner Norwood: All right. Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. Gardiner: So, the position of International is that there is no basis here for a finding of conspiracy or discrimination as far as any of its acts are concerned. That so far as the respondent Anaconda is concerned, that
4260 it never was in the business. The fact it is the parent company of International in no way charges it with the acts of its subsidiary.

In view of that fact we respectfully submit that the complaint should be dismissed so far as those two respondents are concerned.

Argument by Mr. Hinds.

Mr. Hinds: If your Honor please, in behalf of Glidden, a minor correction should be noted on page 6 of our proposed findings, in that in the fifth line of Finding 31 the word "employment" should appear instead of the word "improvement."

Trial Examiner Norwood: Employment?

Mr. Hinds: "Employment" it should be.

Trial Examiner Norwood: Yes.

Mr. Hinds: While we have adopted in so far as applicable the reasons for our findings the same as those suggested by National Lead, we have not, it is true, furnished your Honor with citations to the record or reasons specifically applicable to the additional findings, namely, our Findings No. 2 to 35, which we have submitted in behalf of Glidden.

I shall avail myself of your Honor's kind offer before the 25th to supplement our findings by such reasons and such citations, although I think it is fairly obvious
4261 what our reason is.

We offer only one witness, if you disregard Mr. Burrows whose testimony was principally on quantity differentials in lead oxides, most of which your Honor struck out. Our sole witness was Mr. Sprague, and his testimony is of limited compass, all of which is undisputed.

Our reason for each of our specific proposed findings is that each of them is supported and fairly summarizes the undisputed testimony of Mr. Sprague.

I take it as axiomatic that the materiality of the evidence has been prima facie established by your Honor's admitting it over objection, or without objection. It has been completely undisputed. It can not be rejected as inherently improbable, because I maintain it is not only consistent with probabilities but it is required by inherent probabilities.

So, it seems to me that each of Glidden's proposed findings, if it meets that test—and I think they all do, should almost as a matter of mathematical demonstration be found by your Honor.

Now, Glidden on the conspiracy charge, Count 1, is to a certain extent in a different position from some of the other respondents, particularly with respect to the case in so far as it is based on what was done during the Code or NRA days.

At that time Glidden was not competitive with the
4262 other respondents because, admittedly, it had taken over the Euston white lead products from the Euston Company and the metal refining oxide products from the latter company and was not competitive in price. Its products were not up to the standard nor was the advertising and good will and consumer acceptance up to the standard of other respondents.

The price was correspondingly lower; it wasn't in the same field. So that even if it had entered into an agreement, as to which there is no evidence, as to price, it certainly did not execute any such agreement or did not perform any such agreement, because its prices until considerably after the NRA period were not competitive.

They were very much lower, because it was only after—and it is undisputed—it was only sometime after that period that it was able to get its quality and hence its customer acceptance up to a point where it could compete in price with its competitors, especially National Lead and Eagle-Picher.

Trial Examiner Norwood: You mean by "competing," selling as high as the other companies?

Mr. Hinds: That's right. Its prices were considerably lower. It could not get the prices that the other respondents could, and that is all explained in Mr. Sprague's testimony and summarized, I think fairly, in our proposed findings.

4263 The consignment or so-called agency arrangement was not adopted by Glidden until long after it was adopted by the other respondents, and then only reluctantly, and then only as an optional alternative to its normal method of outright selling, and then only by a form of agreement which differed not only in form but in substance from that of National Lead, and was thereafter abandoned as, in Glidden's case, being unproductive and unprofitable and unsatisfactory.

Trial Examiner Norwood: Glidden did not adopt it until 1939, did it?

Mr. Hinds: It was four years after the others adopted it.

Now, as to conspiracy, the ideal way from the point of of the prosecutor to establish conspiracy would be to have detectives, dictographs, actually hearing the conspirators conspiring, possibly with a motion picture adjunct. That is, of course, not always possible.

I concede that conspiracy may be established by inference from established facts. However, I want to call your Honor's attention to the fact that when you employ the inference method of establishing conspiracy he who has the burden of proof must not only show that the facts are consistent with there having been a conspiracy, but he must exclude any other possible or reasonably probable explanation.

A prosecutor in a criminal case can show that 4264 circumstances under which a man met his death were consistent with the fact that he met it at the hands of the defendant. It is not necessary for the defendant even to show that he met it in some other way. He may demand an acquittal by merely showing that the death might well have resulted from someone else's hand.

Now, in our case we go far beyond that. We point out without proof that the facts which are cited as requiring an inference of conspiracy could well have occurred without such causation. That I think would be enough to require a finding against conspiracy—or rather one of no evidence of conspiracy.

But, we have gone far beyond that. We proved by undisputed testimony numerous facts which, any one of which, might have explained these facts which the prosecutor relies on to draw an inference of conspiracy.

The principal fact, I think, that is relied on, as I understand it, by Commission counsel, is the similarity of price, the following by Glidden of pricing, its selling practices, by the other respondents, particularly National Lead.

As to the former it did not occur until sometime after the NRA days. But we must concede—in fact, our own findings proffer the statement—that we did follow the Na-

tional Lead prices approximately and with consid-
4265 erable closeness. Now, can you infer from that fact
that we had an agreement with National Lead or with anyone else?

I would like to take a simple illustrative case which I think shows in its bare bones the logic of this conspiracy-by-inference theory.

In a certain locality which is both windy and snowy it has been observed that a messenger on bicycle, pursuing his daily route, follows closely behind a moving van which also has the same route. Not only do they find that he does this every day, but when the moving van changes its route around some other blocks you find this messenger still following closely behind the van.

Not only that, but when there is deep snow he actually puts his bicycle right in the rut which is made by the moving van.

Those facts are certainly consistent with the explanation that there was an agreement between the driver of the truck and the messenger that he should follow closely in their track. We inquire of the messenger, we ask him if there was any such agreement, and he says, "No, I never talked to the driver or anyone connected with the moving van."

"Well, how do you explain it?"

He says, "Do I have to explain it? Aren't there many possible explanations other than that we had an agree-
ment? As a matter of fact, I find that I can't suc-
4266 cessfully drive my bicycle in this wind unless I get
behind some big object that is moving in my direction."

"But we note that when the van slows up you slow up, and when the van goes a little faster you go a little faster. How do you explain that?"

"Well, if I didn't keep up with the van I wouldn't get the place I want to get as fast as I would otherwise get there, and I might get back into a wind of my own. If I tried to get ahead of the van I wouldn't get anywhere. I can't buck the wind alone."

"But you follow right in the very rut of the van."

"Yes. I find that makes much easier going."

Those are all precisely shown by the undisputed testimony of Mr. Sprague.

We could tell in advance what the next move up or down in lead pigments would be. We would tell which way it was going to be, because we had observed by scientific studies that the market for lead pigments follows with a time lag the market for pig lead, and we are not charged with having any influence on the market in pig lead.

We could not tell exactly when there would be a change or the exact amount, but we could tell whether the next change would be up or down.

Now, what caused Glidden's changes in price? Glidden determined its own changes of price up or down. And
4267 how did it determine it? It determined it by watching National Lead's price or, to a lesser extent, Eagle-Picher's price. And its price went up or went down with theirs. It was their act. They didn't consult National Lead or Eagle-Picher; they didn't have to, any more than this bicycle messenger consulted the driver of the truck and said, "Please, mister, may I ride in your rut?"

Possibly the driver of the truck did not even know there was a messenger boy following him. More probably, if it happened day after day, he became aware of it. But it was a matter, presumably, of somewhat indifference to him—just as it has been a matter of indifference to National Lead whether Glidden priced itself out of the market by bidding higher or got all the gross profit it could fairly get by not going lower.

Now, I think that sums up the conspiracy charge. And there is judicial support for the fact that you can not fairly infer conspiracy because small producers follow either the prices or the pricing practices of the large producers. They could not have stopped us from following their prices if they wanted to.

Neither this Commission nor any court can order us to bid lower than National Lead or order us to bid higher. They can not order us not to bid exactly the same as National Lead. They can only order us not to agree
4268 with National Lead.

There is not the slightest evidence that we have ever agreed with National Lead or that we have ever con-

sulted with them on prices, even on pricing methods. We consulted with them only as we did so at the earnest insistence of our Government during the Code days, the testimony as to which I will not refer to because others will cover that more fully.

Now, as to the Robinson-Patman Act, the Commission's counsel seems incurably to be obsessed with the idea that while the Robinson-Patman Act permits differentials, if justified by freight differences, that it requires such differentials.

The Robinson-Patman Act does not require any producer to charge different prices to competing customers merely because the cost of freight or any other cost is different. Freight is one of the costs of the producer. There are other costs. The Act cites several of them: selling, cost of production. Freight is merely one of the costs which the seller is confronted with in performing his side of the agreement.

What the buyer does is to pay an agreed sum which is known as the price. What the seller does is to pass title and make delivery of certain specified goods at a time, which is usually implied, sometimes expressed, and at a place which is usually expressed or, if not, it is necessarily implied.

The place of delivery is just as much a part of the
4269 obligation of the seller as the specification of the goods or the time. How the seller gets his goods to the specified place is one of his headaches. It comes under the heading of cost. He has many other costs—the cost of the raw materials, the labor. Even his lawyers sometimes cost him something!

The Commission selects one of those costs and arbitrarily selects the cost of performing with respect to the place of delivery and says the price is not what the parties say it is for performing this contract, that it isn't what Congress says it is and refuses to say otherwise, that it isn't what the Supreme Court says. Price, we say, is an arithmetical difference by subtracting from what the parties agree is the price one of the costs, and we pick out transportation as the cost which we say is to be deducted in order to ascertain what we say is the price.

Trial Examiner Norwood: Isn't he selling transportation also?

Mr. Hinds: That is one of the things that he agrees to do; he agrees that the goods shall be so-and-so, that the time shall be so-and-so, and however he does it, by camelback or by flight or by carrying it on his back, by steamship, by truck or train, he somehow or other will get those goods at a particular price at a particular time and a particular place.

4270 How he does it is one of his costs. Price is an exact opposite term from cost. You can not analyze a price into different costs.

A man says, "I will sell you a horse and saddle for $150." Five minutes before that he had bought the horse for $125. Neither the Commission nor the United States Supreme Court nor any professor of economics can say that the price of the saddle is $25 and the price of the horse is $125. The price of the horse plus saddle is $150, and nobody except the parties themselves can analyze that into two different prices.

In these cases of Pittsburgh plus, where the parties agreed, stipulated, that there should be two prices, one the price of delivering the goods and the other the price of the goods, then of course the courts and the Commission have to take the price as the parties agree on it.

Here the parties agreed on a delivered price, and it was the same for everybody in a given area.

Now, it isn't a sign of mental deficiency to argue that the law should be otherwise. That argument has been made persistently before Congress, urging that the price under the Robinson-Patman Act be defined not as what the parties agree to but given an artificial definition of that price minus one of the costs—in this case the cost of transportation.

4271 Congress has persistently rejected that. The Supreme Court has repeatedly commented on Congress' refusal so to legislate, and has repeatedly said, as it did in the Corn Products case, "Congress was unwilling to require f.o.b. factory pricing and thus to make all uniform delivered price systems and all basing point systems illegal per se."

And in the Staley case the Supreme Court said, "But it does not follow that respondents may never absorb freight when their factory price plus actual freight is

higher than the competitor's price, or that sellers by so doing may not maintain a uniform delivered price at all points of delivery, for in that event there is no discrimination in price."

And again it has said the same thing in a number of different ways. Another place it says—the Seventh Circuit quoting the Supreme Court: "Notwithstanding this Congressional attitude as recognized by the Supreme Court, this court is now urged by the Commission to hold that the system is illegal per se, and to require that cement be sold on an f.o.b. plant basis."

Now, the Act permits differentials provided the sellers can justify these differentials by differences in any one of three costs—manufacture, selling or transportation. It does not require that there be any differentials. It permits them not to have any differentials between two competing buyers, even though their costs may widely
4272 differ. That is something that they are permitted to do but not required to do.

Now, a further argument showing that price means price—and, if the parties agree on a delivered price, it means a delivered price—is shown by the Act itself, because the Act permits a difference in price, and to the extent that there is a difference in the cost of transportation.

But if price means what our friends say it means, the f.o.b. mill net, this permission to justify differences in it by cost of transportation is mere gibberish. How can there be any difference in cost of transportation in an f.o.b. mill net price?

So, Congress besides having rejected the amendments which would have defined price the way the Commission would like to see it, has by the language of the Act shown what it means—that it couldn't possibly mean anything but the ordinary price, the consideration paid by the purchaser for delivery of goods at a particular time and place.

Trial Examiner Norwood: Couldn't they make different f.o.b. mill prices?

Mr. Hinds: Certainly, if the parties agreed that delivery shall be at the factory or that the price shall be less transportation. That is the price. But we are confronted here, as far as Glidden is concerned, with a situation where Glidden agrees. Its price cards state that freight is
4273 allowed; in other words, that the price is the same in

any one zone, no matter how far you are from our factory.

When this was addressed to Congress, the tears that were extracted for the forlorn situation of the man near the factory who is deprived of his so-called freight advantage are clearly wiped away by the fact that the man at the remote place may be selling his competitive products right at the door of the factory.

Our friend very well brought out that fact in our behalf, I thought, this morning, and I will now thank him.

He cited a case where a poor manufacturer in Dallas who used lead oxides, competing with his more fortunate brother in New York, has to pay 25 cents more. But he forgot to remind you—and I think I saw the gleam in your Honor's eye that you caught it—that if this man in New York is competing with the man in Dallas he is soaked with the freight in selling his product in Dallas.

This is an argument that I do not think is really relevant before your Honor, because your Honor has to take the law as it is given by Congress. This, however, would be an excellent way where my friend would knock himself out if he were making this argument in Congress, where it should be made.

Trial Examiner Norwood: The point I queried about this morning was whether or not adding a zone differ-
4274 ential—in other words, if under this system the further away you get from the source of supply the greater the discrimination against the man at home, if you add a half cent zone differential on that doesn't that lessen that long distance discrimination?

Mr. Hinds: It does lessen it.

Trial Examiner Norwood: Just that much? I mean doesn't that minimize it to that extent?

Mr. Hinds: It does lessen it. And I want to be perfectly frank—and whatever concession I make is not to be considered as binding on any of the other respondents—but I think Glidden will freely concede that if our customers in Zone 2, we'll call it, are competing with those in Zone 1, we must show that this differential, taking zone by zone, is no more than compensates us on the average for the additional cost of transportation. I think we have met that proof, and I do not think our opponents dispute that because they argue just the opposite way. They say the discrimination is against the near man and in favor of the

far man, and I agree with them on that in so far as these zone differentials are concerned.

I think, if anything, these zone differentials are not enough. They might well be higher. And when my friend is arguing this way, he argues that we are discriminating against the nearby man. Then when he comes to the
4275 zone differentials he says, "Ah, these are not justified. You don't justify these zone differentials. They are more than the cost of transportation."

You can not have it both ways.

Now, I am going to close with one further observation as to the effect that it would have, at least on the Glidden Company and I think on the industry, of a cease and desist order which would refuse differentials on lead oxides as between carload shippers, large buyers, and the small, fly-by-night, bad-credit, little buyers. That would inevitably, in Glidden's case—and the evidence is undisputed from Mr. Sprague and hasn't been stricken out; your Honor held it to be material and legally admissible. We would like to have all of our business the big carload buyers; they do not require the technical service, they do not require continual credit and investigation, they do not require warehousing, they do not require several other things, and they are all enumerated in our findings.

It is a profitable business. It is the "cream" of the business. And we wish we could take and dared to take more. But in view of great competition which we suffer from the big oxide manufacturers themselves, which our friend points to, who will make their own, invert their own if the price justifies it, and from our colossal competitors, we do not dare take on more than a safe fraction of that business.

4276 Mr. Sprague or Mr. Burrows pointed out that once or twice we got a little bit gay and we bit off a big fraction, and then all of a sudden it went out and we were left with a big hole.

Why, then, do we take this unprofitable higher-priced business? It is higher-priced because they do not get the differential. It is unprofitable relatively. Why do we take it? We take it because we acquired both our lead oxide plant and our white lead plant in order to furnish us with our own manufactured raw materials. It is part of Glidden's policy.

We have to sell most of our stuff, and since we do not

dare and can not sell all of it to the gilt-edge trade, we have to deal with these small fellows. Some of them were on the witness stand, and your Honor could size them up. We have to sell to these people. And if this Commission's order required us to do away with the differentials, we would have to either stop selling to the little fellows because we could not make a profit at a low price, or we would have to give up the lower-priced, more profitable business.

In other words, such an order would advance monopoly because it would knock one producer out of either the small field or the big field. I say that at the present time it makes for American competitive health that we have this reasonable differential so that we can charge fairly in accordance with the real differentials of these various costs.

4277 Trial Examiner Norwood: What about the five-ton differential? Between five ton and less than five ton?

Mr. Hinds: Well, of course, that is a question of degree, and as this Commission has said in many cases, as long as the producers in good faith draw boundary lines we are not going to condemn those boundary lines because it is not possible to justify each particular instance exactly on that line.

A producer is permitted to make, say, three or four—in our case three—classifications. Nobody in the world, no system of cost accountancy, can infallibly put that line exactly at a given point. All that this Commission asks and all that the law requires is that you draw these lines between quantity classes with some reasonable attempt to meet reality.

Now, the fact that our smallest type is the least profitable, and the middle type is less profitable, and the top classification is the most profitable and most to be preferred, to my mind shows our good faith in making these quantity differentials. We would prefer to sell them all at the lowest price, much prefer to lose the differential and be saved the expense of warehousing and higher costs on trucking and so forth.

Mr. Wright: May we have a recess?

Trial Examiner Norwood: Five minutes' recess.

(Whereupon, a short recess was taken.)

4278 Trial Examiner Norwood: Proceed.

Argument by Mr. Wood.

Mr. Wood: I am going to take up two small points out of order because they more or less follow right along the lines of Mr. Hinds' discussion.

I call attention to the zone maps in the suggested findings of fact for the Commission and to the dry white lead zone map.

Now, we are criticized as violating the Robinson-Patman Act because we sell at the same price in St. Louis as we do in Texas, or vice versa, because we sell at the same price in Texas as we do in St. Louis. That is a violation of the Act according to the Commission.

If you turn the page to the next map you find that we are criticized because we charge more. So, we apparently violate the Act because we do not have a zone or because we do have a zone—either way.

I call your attention to the inconsistency of that position.

On the Robinson-Patman Act itself I agree entirely with Mr. Hinds that the Act intended to leave things as they were as far as prices were concerned in this respect. Part of the goods of the country, as we know, are sold, f.o.b. Automobiles, f.o.b. Detroit. Machine tools, f.o.b. Cincinnati. A great many other things are f.o.b.

4279 On the other hand, there are just as many, if not more, things that are sold on a delivered price basis as a matter of common custom.

As I see it, the Robinson-Patman Act did not intend to change that at all. It intended to leave it just as it was. But it did provide that where there was a difference in cost of delivery that could be taken in account if the seller wished in making the price differential. He did not have to make a price differential, but he could use that as a reason for making a differential if he chose.

I think that is the correct meaning of the Act and that the Act on its face shows that it did not intend to outlaw delivered price selling per se, because otherwise that difference in cost of delivery would make no sense then.

Trial Examiner Norwood: The differences would justify a lower price but not the same price? It that right?

Mr. Wood: The difference in cost would justify a lower price if you wanted to give a lower price, but you

do not necessarily have to give a lower price. There is nothing to compel you to give a lower price.

Now, turning to page 7 of the Commission's proposed findings, I call attention to the three paragraphs in the middle of the page in respect to Eagle-Picher. Eagle-Picher does not at the present time operate a lead pigment factory in Cincinnati. It disposed of the property,
4280 and there is nothing in the record to indicate that Eagle-Picher is manufacturing in Cincinnati.

Trial Examiner Norwood: Where is that statement on that page?

Mr. Wood: I think it is—

Trial Examiner Norwood: I see it now—the fourth paragraph.

Mr. Wood: The fourth line down.

Trial Examiner Norwood: The fourth line down in the first full paragraph.

Mr. Wood: I wrote to Mr. Wright about that. The Cincinnati plant is completely out of operation, and Eagle-Picher's only white lead plant is in Chicago now.

Also there is the finding that we added the International Smelting and Refining business to our business. There is nothing in the record to indicate that we got one nickel's worth of the business they used to have. They closed down their plant; we bought the plant. But there is nothing in the record to show that we took any of their business at all, a single customer.

I have commented before in the record on the Commission's attack on Eagle-Picher because National apparently harbored designs to acquire it once. That is a dead issue in the case, because nothing happened. And I do not see where any findings should be made on that score.

4281 Trial Examiner Norwood: Which is that now? That last remark?

Mr. Wood: All of the findings in respect to National's purchase of Eagle-Picher's stock and the offer to buy the business and good will of the company—which, by the way, was never submitted to the company. It was submitted to Mr. Hertenstein who was an officer of the company, but he sent it back refusing to submit it to the board of directors.

The proposed finding of fact of National Lead Company is accurately stated; the proposed finding of fact of the Commission is not accurately stated.

Trial Examiner Norwood: What page is that on?

Mr. Wood: Can you come up with the page there, Joe?

Mr. Wright: That is discussed on page 6 of the proposed findings.

Trial Examiner Norwood: Are there any inaccuracies in that paragraph beginning, "In February 1906 * * *"?

Mr. Wood: Made by National in June 1931 but was not accepted by that company. It was not even submitted to the company. I would not say it is exactly inaccurate, but the innuendo is that it was submitted to the company and the company turned it down, where the fact was that it was submitted to an individual who declined to submit it to the company.

As I say, the proposed finding of the National Lead
4282 Company is accurately worded.

Trial Examiner Norwood: Well, how would that affect Eagle-Picher anyway?

Mr. Wood: That is what I would like to know. That is the point I was coming to—that I can not see it has anything to do with Eagle-Picher whatsoever.

We are charged here with an unfair method of competition. Anything that happened between directors of Eagle-Picher Company and National back in 1931 that led to nothing is no evidence of any unfair method of competition or participation in conspiracy or anything else on the part of Eagle-Picher. I think it is completely irrelevant to the case.

Trial Examiner Norwood: I do not think that that was received by me as showing anything against Eagle-Picher—that offer of National. It was offered as against National.

Mr. Wood: This is a conspiracy charge. I have nothing more to say about it if it is understood that it has nothing to do with Eagle-Picher.

Now, the Commission's position is very difficult to comprehend in some respects, because it takes this position, that National is so big, so powerful, so monopolistic, that it has controlling power and can force Eagle-Picher and the rest to follow it; and, on the other hand, that we have conspired to follow them.

Now, certainly if they haven't the power to force
4283 us, that negatives the inference, in the absence of any clear showing, that we have conspired with them to do it.

The truth is sort of halfway in between there. Eagle-

Picher does compete with National but is not strong enough to compete in price. In other words, National is the bigger company, with the larger distribution, the greater number of plants, the greater resources. They have some of that power that the Commission attributes to them, and Eagle-Picher can not pursue an independent pricing policy.

If we cut a price, they can cut it and then cut it again. And if we start to fight that way, we are going to get licked. I mean there just is not any question about that.

So, to that extent the Commission is right. But where in its complaint it summarizes the evils allegedly flowing from these practices complained of and states the competition is stifled and nullified, now that is not true. We put on a series of witnesses on behalf of Eagle-Picher, all of whom testified to Eagle-Picher's efforts to compete with National.

The Commission talks of matched prices all the time. Now, this money that Eagle-Picher is putting into research, a very substantial amount of money that otherwise might go into profits, they are putting that in to avoid matched products. We are doing everything we can to have better products.

4284 The mere charge of matched prices seems to me rather silly when a company is spending a fortune to avoid matched products. The two are not consistent. We could pocket that profit if this was a rigged industry and we weren't competing. There is no point at all in putting that money into research except for the sake of competing to better advantage.

We had witnesses who testified about the dry pigments. We had witnesses who testified about the battery oxides, about the technical services provided by Eagle-Picher.

We put in pictures of the fence out in Joplin, with the thousands of samples on it. We showed that all of that was available to all of our customers. We testified about our work with battery oxides. We showed that about half of the batteries made in the country are made by concerns who manufacture their own battery oxides, who do not buy them either from Eagle-Picher, National or anyone else.

Mr. Mitchell testified that he started out with a small company and that his company grew. He testified that Eagle-Picher was instrumental in keeping the small companies in competition with the large battery companies who manufactured their own oxides.

Trial Examiner Norwood: Eagle-Picher charged that differential on the less than five ton, didn't it?

Mr. Wood: We follow the pricing policy of National quite literally. There may be a few points of devia-
4285 tion, but to a major extent we followed the pricing policy of National except on a product like lead sulphate or blue lead or leaded zinc oxide or some of our specialties which compete with National products. That is, our basic lead sulphate competes with their basic carbonate in mixed paints.

On the pricing of our sulphate we are rather in an independent position. Of course, we sell it in relation to a great many other cost factors; that is, the price of carbonate and—oh, there are a lot of factors that enter into the pricing there. But we are not in the same position on basic lead sulphate as we are on basic lead carbonate, because we make it from ore concentrates instead of putting it through the stage of pig lead.

Trial Examiner Norwood: You sell that for less than National sells the carbonate?

Mr. Wood: I think it is usually a half cent a pound under the price at which National sells the carbonate. We sell more basic lead sulphate than carbonate to the mixed paint manufacturers, and we have always urged it and pushed it in paint formulæ. In fact, one of the purposes of the test fence is to test one against the other and to be in a position to prove to our trade that they can make up formulæ with the basic lead sulphate that will give them as good results at a lesser price than they can get with the carbonate.

It is that type of thing I refer to when I say there
4286 is competition and active, vigorous competition between the two companies. And regardless of the coincidence of some of the pricing policies they are forced to by the size and power of National, still we are competing as hard as we can in the only way that it is safe for us to compete, by offering different and better products, better technical service, everything we can give them in the way of laboratory help, research, advice, and everything else.

I call attention to the fact I have asked for specific findings in regard to the subject matter which I have just discussed.

Trial Examiner Norwood: Yes.

Mr. Wood: And you will remember that the president

of Eagle-Picher, Mr. Bowlby, testified that this was the policy, the competitive policy, of the Eagle-Picher Company, which it had been pursuing as a matter of company policy over a period of years.

Now, Mr. Wright said this morning that as to the Robinson-Patman Act there were two types of discrimination—discrimination coming from selling on delivered price and selling on zone system on one hand, and discrimination as a matter of quantity discount on the other hand.

Back in June 1946 when Mr. McIntyre put in those heavy summaries of invoices, I raised the objection that we ought to be given some warning of just how those were to
4287 be used. Apparently my fear was unfounded, because when I had received this document I looked in vain for anything specific as to just where Eagle-Picher had violated the Robinson-Patman Act. There is absolutely nothing in here—that is, in the Commission's proposed findings of fact—that tells me any more than I was told in June 1946 as to just what it is that the Commission claims to be a violation of the Robinson-Patman Act on the part of Eagle-Picher.

Now, it is true that we have followed the pricing policy of National, but the mere selling at different prices is not in and of itself a violation of the Robinson-Patman Act, because the Act specifically provides and I quote:

"And where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce or to injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with the customers of either of them."

Well, in the first place, I am sure that it is not charged that any of the pricing policies of Eagle-Picher tend to create a monopoly in any sense. There is nothing in the record to justify it, so that is out.

The last part of it—"or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination"—there is nothing in the rec-
4288 ord here to show that anyone has knowingly—I mean any customer of Eagle-Picher—has knowingly received the benefit of the discrimination. There is absolutely nothing in the record to justify any finding in that regard.

That leaves the question of whether or not the effect of

such discrimination may be substantially to lessen competition. We are in no position to defend in respect to that charge unless we are given specific instances. In other words, we have to be told, "You sell to Customer A, let's say, in less than carload lots. You sell to Customer B in carload lots. The price is different on the two. Those two companies are in competition with each other, and that competition is lessened."

Then, we have a chance to say, "Well, no. After you look at all the factors in the case, the competition is not lessened. They are still in competition and in plenty of competition."

If we are not given certain specific situations, then we are in a position of having to try to prove a negative, you might say. In other words, we would have to take all our customers and say, "We sell to Customer D at one price, and we sell to Customer X at another, but there is no decrease in competition there."

Then, we would have to go on to Customer E and Customer Y and all the permeations and combinations.
4289 We would have to prove a series of negatives, you might say, unless we are given some sort of specific proposition to meet and given a chance to defend ourselves on it.

Now, I have searched through this in vain, and I can not find a single instance where there is an example of competition being lessened.

Mr. Wright said something this morning about some battery manufacturers in Joplin, Missouri, one of whom I think bought at less than carload price, or something like that, and there was competition from national manufacturers located elsewhere.

I do not see where that is evidence. That was his statement. I do not think it is in the record in quite that form. But, even so, I do not see where that is evidence of lessening competition. That is evidence that there is competition. It might be Mr. Wright's theory that the man in Joplin was entitled to a monopoly in Joplin; that is one possible theory. But the statute says "lessening competition," and I do not see how evidence that there is competition can be construed that competition is being lessened or injured or destroyed.

In regard to the battery manufacturers in Chicago, there was just one after another that came in and testified. There

were any number in that group who testified they started out as small companies, that they bought on the less
4290 than carload scale, that they were helped along and received technical help from Eagle-Picher or National, that they grew, that they got into carload class, and they competed with other concerns.

There were numerous examples of that type. And it seems to me that that is evidence that competition is not being lessened in fact. The mere fact that some very small fellows say that five cents a battery might make a difference to them—I mean the very smallest in the industry, the rebuilders, the people that work in cellars and attics and do not have insurance or any accounting or any of the normal costs of business—of course they'd like to pocket every extra nickel they could get. And from the looks of some of them a nickel might have counted quite a bit!

But, taking that Chicago testimony as a whole, the testimony was that there was a great deal of competition and active competition. The little were competing with the big, and the big were competing with the little. And that the battery business of the country was handled by over 200 manufacturers at least.

The same way with the paint business. There are hundreds of small paint companies. The paint people too would like their extra nickel or dime. But the testimony is there that small companies are competing with Sherwin-Williams and Glidden and duPont and all the rest of
4291 them. They are competing with small paint companies.

There is no evidence that these pricing policies have in any way prevented widespread and wholesale competition in the paint business. In fact, all the testimony is that there is competition. And, of course, where there is competition anybody would like a nickel or dime saving if he could get it. That is human nature.

But I do not think that type of testimony is sufficient to satisfy the statute that the pricing policy lessens competition. That is entirely a matter of guesswork one way or another. And I want to repeat that in as far as Eagle-Picher is concerned, for us to be enjoined under the Robinson-Patman Act, it seems to me, it has to be shown that some specific violation of the Robinson-Patman Act existed, some situation where competition may be substantially lessened by the existing practice, and that it can not be done by means of generalities.

That applies to the Commission's case regardless of whether the quantity discount is involved or whether the zone differential is involved.

Now, I also ask for the finding that Eagle-Picher can not compete with National except by selling on a delivered price basis because of National's greater size and greater number of manufacturing plants. We are the second largest; that is, Eagle-Picher is the second largest. It is
4292 trying to compete. I think it is clear from the Government allegations, from the statements made by Mr. Wright, and from all the evidence in the case that it is absolutely necessary for Eagle-Picher to be able to put down goods in a customer's factory at the same price National does, no matter what you call it. We have to be able to deliver the goods at National's price. Otherwise, with our smaller number of factories, our smaller size, we are simply going to be out of business, and National will have the whole thing.

I am going to file a written reply, a written statement in reply to this. I received it at such a late date that I did not have time to prepare in detail with citations to the record for this argument.

Trial Examiner Norwood: Counsel may do that.

Mr. Welch: Your Honor, without at this time presenting my argument in connection with proposals that have been made on Sherwin-Williams, I would like to take just a few minutes in connection with the argument that has been made by Mr. Hinds and Mr. Wood, particularly on the meaning of the phrase "may substantially lessen competition" as it appears in the Clayton Act.

I call attention to the case of the *Standard Fashion Company* v. *Magrane Houston Company*, 258 U.S. 346. That case involved Section 3 instead of Section 2, but the lan-
guage is the same in that it prohibits certain con-
4293 tracts or agreements or understandings where the effect may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

That language is exactly the same as the language in Section 2; consequently, the court's language is equally applicable, and I quote from the decision handed down by Mr. Justice Day:

"Section 3 condemns sales or agreements where the effect of such sale or contract of sale 'may' be to substantially lessen competition or tend to create a monopoly. It

thus deals with consequences to follow the making of the restrictive covenant limiting the right of the purchaser to deal in the goods of the seller only.

"But we do not think that the purpose in using the word 'may' was to prohibit the mere possibility of the consequences described. It was intended to prevent such agreements as would under the circumstances disclosed probably lessen competition or create an actual tendency to monopoly; that it was not intended to reach every remote lessening of competition is shown in the requirement that such lessening must be substantial."

I just wanted to call that Supreme Court decision to your Honor's attention in connection with the arguments advanced by Mr. Wood and Mr. Hinds.

Mr. Wright: I just want to say one thing. I am
4294 not going to attempt to make any detailed answer.

But with reference to Mr. Welch's quotation of the Magrane Houston decision and the meaning of that term as applied to Section 3, I would like to invite your Honor's attention to the recent opinion by the Supreme Court of the United States in United States *vs.* International Salt Company, also involving Section 3 where an entirely and wholly different construction was put upon that very phrase.

Trial Examiner Norwood: What is the volume?

Mr. Wright: I can not give you the citation. It is the present term; it is unreported. It is within the past few weeks, handed down by the Supreme Court. I will attempt to furnish a copy of that in support of it.

Trial Examiner Norwood: I think I have a copy on my desk.

Mr. Ewing: I move, your Honor, that we adjourn to Monday here, at which time I will present National's position and Mr. Welch that of Sherwin-Williams.

Trial Examiner Norwood: Is there any objection to that?

Mr. Wright: No, sir, no objection at all.

Trial Examiner Norwood: I will put on the record an explanation while Mr. Wood is here. I told counsel that they may file supplemental or reply proposals and any sort
of briefs or arguments that they wanted to not later
4295 than January 25th. I have thought about that since
Mr. Gardiner insists on a few more days. I think that is too late. Physically I don't think it would be pos-

sible to be any later than that. But if it is after that date, you can file it with the Commission anyway.

I could not undertake to transmit those things if they are not filed before that time—on or before that time. I could not undertake to transmit those and submit rulings on them for the record in my report if they are any later than that, because I am endeavoring to finish this by the 31st of January. I may not be able to do so.

But I do not see how I can see my way clear to extending the date any further than that. If it comes in after that, though, I will transmit it to the Commission along with my report.

Mr. Gardiner: Could your Honor make it the 26th, which is Monday?

Trial Examiner Norwood: Yes. If it gets here Monday I will receive it and rule on it. That is Monday, the 26th.

Also I will ask counsel to properly specify which are proposals on which the Procedure Act requires me to rule, and which are reasons and argument. They have done that in these very helpful proposals that are already made.

So, with that understanding, we will recess until
4296 10:00 a.m., Monday, being January 12, 1948, in this room, Room 332, Office of the Federal Trade Commission, Washington, D. C.

(Whereupon, at 4:00 p.m., January 7, 1948, the hearing in the above-entitled matter was adjourned.)

4297 Room 388
Federal Trade Commission Building
Washington, D. C.
Monday, January 12, 1948.

Met, pursuant to adjournment and agreement, at 10 a.m.

Before:

John W. Norwood, Trial Examiner.

Appearances:

Joseph S. Wright, Esq., appearing for the Federal Trade Commission.

James D. Ewing, Esq., and
E. Z. DuBose, Esq., appearing for the National Lead Company.

J. T. Welch, Esq., appearing for The Sherwin-Williams Company.

4298 PROCEEDINGS.

Trial Examiner Norwood: The hearing will come to order. Pursuant to adjournment on January 7th, the hearing in Docket No. 5253 is now convened in room 388, Offices of the Federal Trade Commission, Washington, D. C., at 10 o'clock a.m., Eastern Standard Time, January 12, 1948.

Appearing for the Federal Trade Commission: Joseph S. Wright.

Appearing for the respondents: James D. Ewing; E. Z. DuBose; and J. T. Welch.

The hearing is convened to receive further argument, and any corrections of the record which counsel may wish to offer.

Mr. Wright: Your Honor, there are a number of corrections in my statement of January 7th. I am only going to touch upon those which make some substantial difference. On page 4215, line 5, the figure 2, referring to the sections of Article 7 of the Code for the Lead Pigments Industry, should be 3.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. Wright: There is a statement appearing on lines 13 and 14 of page 4239 that might be subject to some misinterpretation, although it is a literally accurate
4299 statement, that there are no instructions to dealers bidding on Government business. Well, that is true, in the sense of dealers for resale, so far as I know, but there are instructions in the record, as appears from the exhibit, to the branches and agents as to the method of bidding on Government business.

There are a number of other corrections, which I will take up later, as they aren't of too considerable importance at this time.

Argument on Behalf of Respondent, National Lead Company.

Mr. Ewing: On behalf of respondent, National Lead Company, we propose to outline generally our position in this case, what we think it has boiled down to by way of really fundamental issues, and, without going into any great detail, indicate why we have submitted the proposed findings that we have, and comment in some detail with respect to each or certain of them.

In preparing our proposed findings, we were mindful of the new Administrative Procedure Act and of the new rules of the Commission, and we have endeavored to set forth factual statements as far as possible, and where they require explanation such as to indicate that they are ultimate facts, we have tried to give them. Perhaps we have gone unnecessarily into detail in respect to some matters, but we felt that to cover the subject under the conditions under which the proposed findings were prepared, that it was necessary.

4300 Now, I propose to discuss what we might call the affirmative side of our position, and when I am finished, Mr. DuBose is going to discuss the Commission's proposed findings.

My recollection is that back in February, 1947, after the Commission's case had been completed, Mr. Wright stated that this in his view—and he was expressing his personal view—was essentially a price fixing conspiracy case. Of course, he was not eliminating the Robinson-Patman angle.

As I see it, from the standpoint of the conspiracy

charged, this case has boiled down to, say, three fundamentals. They are; of course, not as simple as I am going to make them, but there are three fundamental points that I see in the claim, or in the charges as supported in the Commission's case.

First, it is claimed, as I read the record, that the adoption of what we have called the agency plan, was one of the evils, and a part of the conspiracy charged.

Second, the adoption of the zone system of selling, or method of selling, if you prefer. Putting that in another way, you could call it the use of territorial divisions, or territorial differentials, there being a uniform price in each territory graduated as the country goes west until you come back to a normal par on the west coast. When I speak of those two methods, agency and zone, I am not unmindful of the fact that not all of the respondents used agency, and I am not unmindful of the fact that at
4301 least one of the respondents takes the very positive position that they do not use a zone or territorial method.

The third fact, or the third one of these three points, is the use by some or all of the respondents generally of what has been described as uniform terms and conditions of sale. Now, of course, the contentions made with respect to those three major features in the case, go into a great many ramifications.

As to the second part of the case, there is the fundamental claim that the use of a uniform zone delivered price method is per se a violation of the Robinson-Patman Act, because it is claimed that there is discrimination as between the near buyer and the far buyer in each territory, and it is also claimed that the use of zone differentials in and of themselves is bad.

As I read Mr. Wright's proposed findings, I see now no claim similar to the one made in the complaint, or the amended complaint, to the effect that there is discrimination as between customers along the zone boundary lines or borders. And I think that Your Honor will recall that there was considerable testimony to the effect that there was no such thing, and that the territorial outlines had been adopted with the idea of eliminating, or at least reducing to the absolute minimum, the possibility of there being an adverse effect on competition.

There is also the claim that the oxide differentials
4302 are discriminatory. And, finally, there is the claim in the case of the National that discrimination results, or has resulted from the agent classification on the one hand and the dealer classification on the other.

Now, as I see it, those are the main points in the charges against the respondents.

Trial Examiner Norwood: Now, in that oxide differential, you refer to the five ton differential?

Mr. Ewing: The quantity differential.

Trial Examiner Norwood: In the sale of dry white lead.

Mr. Ewing: Oxide. Carload 5 ton and less than 5 ton. Now, while there may be quarrel with the wording, I think that a substantial portion of the first section of those findings is not the subject of any real dispute. We felt that as a basis for the subsequent findings, it was advisable, if not necessary, to first cover in some detail the nature of the products involved in the proceeding. Now, we all know what they are, and I am certainly not going to waste everybody's time by standing up here and talking about these products, but I do want to emphasize two things in connection with them.

In the first place, the respondents had competing products in two senses, to the extent that they all manufactured dry white lead basic carbonate. We say that they competed with each other, to the extent that Eagle,
4303 for example, not only manufacture the dry white lead basic carbonate, but also the sulphate, which they say they press, and which the record shows to have been sold, at least in recent years, in greater quantity than they have sold their basic carbonate.

There is another element of competition—there is the further element of competition with certain products that are not lead pigments, for example, that have been mentioned, described somewhat, in this proceeding, ingredients which enter into and have entered into the manufacture of so-called ready-mixed paint. And there is evidence in this proceeding that clearly establishes that the lead pigment business, leaving aside the oxide, from the standpoint of the paint industry as a whole is a very small factor as compared with the ready-mixed paint business. It has, therefore, been our contention that the ceiling of the ready-mixed paint business hanging over all of the lead pigment

business, involving paints ultimately, is a factor which constrains against monopoly and also against unlawful competition and conspiracy.

The second factor that seems to us of importance about pigment—and I do not believe there is any dispute about this—is the importance of pig lead. Now in the original complaint the Commission charged in effect that National controlled the price of pig lead through its large purchases from the American Smelting and Refining Company. In the amended complaint that charge, if I have correctly
4304 stated it, was in effect withdrawn, and there was a substitute of quite a different nature, although fundamentally, perhaps, bearing on the same point.

It is charged in the amended complaint, paragraph 7-A-8, that National, through its relationship with American Smelting and others, had a monopolistic influence on and was an important factor in the determination and quotation of market prices for pig lead, and that American Smelting and Refining holds a dominant position in the sale and production of pig lead.

Now, I think that so far as those charges are concerned, it is fair to say that through the testimony of Mr. Brownell, former chairman of the board of the American Smelting and Refining, and also through the testimony given more than two years ago by Mr. Baer, it is clear that while National has been a large customer of American Smelting and Refining, about which there is no doubt, that it has not exercised, and does not exercise, and could not exercise, any control over the pricing of pig lead. And that is further borne out by the fact that the record shows that in recent years National's purchases, generally speaking, have been in greater quantity from the St. Joe Lead Company than they have been from any other source. That, of course, in a sense is a side issue, but it points up the fact about which I am sure, there is no dispute that the price of pig lead is a very important thing in this case, because, these being lead pigments, and pig lead as converted
4305 being the principal ingredient in the pigments, and representing substantially all of the material cost in the case of some pigments, and a substantial part, at least, in the case of others, it naturally has a direct bearing—the price of pig lead naturally has a direct bearing on the price of lead pigments, I am going to say more about price later.

The next heading that we put in our findings was to out-

line the business of the respondents. Now, there is no need of discussion on that. There isn't any real dispute about that. It is there, really, simply for record purposes. We give some statistics with respect to the business done, but it has no particular importance other than the general background. We then give the history, as we read the record, of the National Lead Company itself.

Now, there has been a suggestion in this case that prior to the organization of the National Lead Company in 1891, you had a very active, competitive industry, comprised of a great number of small companies, all engaged in the business to a greater or lesser extent. The detail does not appear in the record, if my memory serves me.

There isn't any question about the fact that in December, 1891, National was organized, and the process of the organization took the form of its acquiring the assets of some sixteen or seventeen companies, most of which were in the lead pigment business—I think there was one
4306 linseed oil company, or castor oil company—and at the same time it acquired the stock of those companies, all of which had been members of the so-called National Lead Trust, which existed prior to 1891 and in substance controlled the industry. So, it is not quite exact to say that you had a lot of competing individual entities before and that National Lead when it came into being, scooped them all up and made them into one tight knot.

Trial Examiner Norwood: Well, what is the difference in the concerns owned by the National Lead Trust, and the United Lead Company? Are they the same thing?

Mr. Ewing: No, sir. The United Lead Company was organized by the Guggenheim interests and Thomas Fortune Ryan. It was an amalgamation of companies, and eventually the United Lead Company was sold to the National Lead Company in February, 1906.

Now, there is a difference between the two situations, because the companies making up United Lead Company were principally engaged in the manufacture, sale and distribution of metallic lead and lead alloys as distinguished from the business of the National Lead Company, which was lead pigments.

It is unimportant, perhaps, but the record indicates that the Guggenheim interests forced the sale, or the purchase by National of United Lead.

Now, in 1907, the National Lead acquired the stock of

Magnus Metal. Magnus Metal was never engaged in
4307 the sale of lead pigments, or their manufacture.

In March, 1913, we acquired all of the stock of Heath and Milligan Manufacturing Company, but in September, 1919 we sold it to the Glidden Company.

Prior to that, and in March, 1906, we had acquired the stock of the Carter Lead Company, and in 1912, the stock of the Matheson Lead Company, and so on, as set out in our findings, and in our answer.

Trial Examiner Norwood: You say Magnus was sold to Glidden?

Mr. Ewing: No. Heath & Milligan. Now, there is testimony, not exact as to date, except it places the time a great many years ago, that indicates with respect to the plants which had manufactured lead pigments, for economics, and other similar reasons, National abondened manufacture. We have, if I recall it now, some 12 branches. I think the record indicates that at one time or another there was some form of manufacture at those branches. Now there are five branches, which encompass a plant which makes lead pigments in the form of white lead basic carbonate. There are nine plants which manufacture the oxides, litharge and red lead.

Trial Examiner Norwood: Let me see—National now has twelve manufacturing branches?

Mr. Ewing: Twelve branches, but not manufacturing branches. At five of the twelve branches, you will find
4308 a white lead plant. At nine out of those same twelve branches, you will find an oxide plant.

Now, on pages 10 and 11 of our proposed findings—finding No. 16, we set out in some detail what I will term for convenience the Eagle Picher transactions. It has been charged that National has attempted to acquire, or has acquired or did attempt to acquire the control of the Eagle Picher Company, and there have been three divisions of evidence on that point—if divisions is the right word.

First, there is the unquestioned, undisputed fact that through Mr. Cornish, National did in fact acquire in the early '30's and continued to hold until the early '40's, up to some forty thousand odd shares of stock of Eagle Picher. And it is also clear, and I do not believe disputed, that, as the result of that stock transaction, National made a very nice profit, to say the least.

The testimony from Mr. Simon, the treasnrer of the

National Lead Company, who was right in on the transactions, is clear and unequivocal to the effect that National bought it as an investment. They did have a policy that permitted them to invest in companies of the same general nature where they thought they knew something about the business and could make an intelligent investment. But, as the record indicates, they made no great practice of that.

Secondly, and this, I believe, has been the subject
4309 of much more discussion than it deserves, there is the evidence, in the form of the Chatfield letters, which to my mind, and I would say to any reasonable man's mind, simply indicates that an ambitious broker was trying to drum up a deal, and he certainly didn't drum one up. And, as I have said before, and as I hesitate to say again, it is no proof of anything, so far as I can see. Certainly we didn't inspire it, and there is nothing to indicate that we inspired it, and it certainly cannot be used as the basis for an inference that we were trying to get into the Eagle Picher picture through that channel.

The third thing, and here there is no dispute, is that some time early in January, 1931, Mr. Hertenstein, who, in fact, was vice-president and director of Eagle Picher, came to Mr. Cornish as an individual and attempted to arrange a deal whereby National should purchase a substantial amout of Eagle Picher stock.

By May of 1931 the point was reached where Mr. Cornish and National felt themselves in a position to make an affirmative offer, and a copy of that offer, which was in the form of a letter addressed to the president and the board of the Eagle Picher Lead Company, was sent by Mr. Cornish to Mr. Hertenstein, with the request that he deliver it to the proper authorities.

At the same time, Mr. Cornish sent a copy of that letter to the Department of Justice, which had been receiv-
4310 ing advice about this proposed transaction from time to time.

Mr. Hertenstein replied to Mr. Cornish, stating that the stipulation didn't go so far as to cover what he said. Mr. Hertenstein never delivered that letter, as requested by Mr. Cornish. In other words, it never reached the Eagle Picher Company officially, and he returned it to Cornish without presenting it to the board, expressing the opinion that the offer was unsatisfactory. And that was the end of that.

Now, it is obvious that the proposal as contained in the letter was there to be submitted, if Hertenstein had wanted to submit it, and to that extent it indicated a willingness on National's part to do what it proposed to do. But, to my mind, it is equally obvious, and particularly because of the steps taken in connection with the Department of Justice, that that is not substantial probative evidence of an attempt on National's part at monopoly.

Trial Examiner Norwood: Did they offer a stated price in that letter?

Mr. Ewing: My recollection is that they did. Am I not right, Mr. Wright?

Mr. Wright: Well, I do not recall that they did in that letter. Off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

4311 Mr. Ewing: I do not want to trust my recollection as to what it stated with respect to price, but, of course, the letter is in the record.

Now, I think that I have reached the point which leads to a discussion of the activities of the respondents in the Lead Industries Association. I am afraid that I am responsible for having burdened the record with a great deal of material in that connection.

I have already said, and I repeat it, because I think it is one of the most important facts in this case, that Lead Industries Association is an entirely different colored horse from any other industry association that I have seen involved in one of these proceedings brought by the Commission. In fact, if the others are horses, the Lead Industries Association isn't a horse at all.

I say that, not only because of the nature of its activities and its purposes, and the way it carried them out, but also because of the very nature of the beast itself. The Lead Industries Association was formed back in November, 1928, and, according to its charter, it was formed to foster scientific research, promotional work, disseminate pertinent information concerning lead products, and act as a representative of the industry before the public.

From the very beginning, it included the primary producers of lead, that is, the miners, the smelters, and
4312 the refiners; and it also included the manufacturers of lead products, some of whom were also ultimately retailers of lead products.

Now, it is perfectly obvious, and the secretary of the association so testified in effect, that a large smelter and refiner, such as American Smelting and Refining, or St. Joe Lead Company, would not stand idly by and let National Lead and the associated manufacturers or processors of lead pigments, monopolize manufacture and distribution of the finished product, because if they did, they would cut the outlet for their own production, and it would necessarily be very much against their self-interest.

The same, of course, is true in converse with respect to the position of the manufacturers of lead pigment. If they found the smelters and refiners going monopolistic, they would certainly want to take action about it.

Now, that, in effect, was the testimony that Mr. Wormser gave. And you will recall that back in New York in April, 1947, he testified in some detail as to what the association did, and what views various members had expressed with regard to the activities of the association; and his own personal views.

So I say that as far as its purposes, its inception,—and I am now speaking generally,—its activities are concerned, the overwhelming weight of evidence shows that 4313 Lead Industries Association took no part in, would have violently opposed, and would have had nothing to do with a conspiracy such as that charged.

Now, it is interesting to note that in this proceeding, Lead Industries was not made a party. There again is a difference between it and some of the other proceedings, not being a party, but being the subject of charges put Lead Industries in an anomalous position, to say the least.

It is true that the amended complaint does not charge Lead Industries Association with nefarious activities to the extent that the complaint itself did, but it does charge that the respondents—and I will summarize—it is paragraph 7-B-3—in effect that the respondents secured the advice, assistance, and cooperation of Lead Industries Association in fixing, adopting, publishing and using non-competitive terms and conditions of sale.

And it further charges, sub-paragraph 4, that the respondents exchanged directly and through the offices of Lead Industries Association price factors and informing concerning price factors expected to be used and which at times were used in calculating, determining and announcing prices.

Lead Industries not being represented, I am in effect undertaking to represent them. As I said, in the overall picture, the evidence is overwhelming in establishing that Lead Industries did not and could not have furthered
4314 a price fixing conspiracy in this case. No price information was ever disseminated by Lead Industries Association.

It is true that each company reported to Lead Industries Association certain statistical matter, but that statistical matter was never transmitted from the Association office, say in the case of a report made by National, to Sherwin-Williams, with the statement that this is National's report. What was transmitted and published was the overall picture, the totals of all, and I do not believe at this time that Mr. Wright makes any contention that there was price reporting as such, or dissemination of price information as such.

Now that leaves, I believe, in the Association's history that which is perhaps the most important single thing in this case, and that is, what did the respondents as members and the Lead Industries Association do in respect to the National Industrial Recovery Act and Codes.

Now, I do not pretend to carry the detail in my head, and if I tried to carry it, I would undoubtedly make a series of erroneous statements, but I think I can summarize the picture generally.

There was a master code for the lead industry, and under it, it was contemplated that there should be filed supplementary codes, and one of these supplementary codes was to be a supplementary code covering the lead pigments division of the industry. Those supplementary codes
4315 were to cover unfair practices.

There isn't any doubt about the fact that the lead pigments division of the Lead Industries Association, whose members were the representatives of the companies interested in those goods, met for the purpose of formulating a supplementary code, commencing their meetings early in July, 1933. They met repeatedly. They met in two subdivisions. There was a dry products committee, which in turn had a white lead and oil subcommittee. There was an oxide committee, which was part of the dry products committee, as I recall it.

Now, these people didn't want any code at all, and they didn't want this supplementary code, but, as the record

shows, the Deputy Administrator, N. R. A., was very, very insistent. So they attempted to undertake the drafting of the code, and the record, as you know, is full of successive drafts. It is also full of the meetings.

Each and every one of these meetings—and I believe that this appears in almost all of the minutes—was held in connection with the formulation of this code, or the attempt to formulate it. And, if that doesn't appear affirmatively in the minutes themselves, it is clear from the testimony of Mr. Wormser and of others who actually attended meetings and who have testified in this case.

These discussions embraced a number of subjects, all of which were brought up and considered for the pur-
4316 pose of determining whether they should be proposed as an element or elements of the code.

In many instances you will find that a committee adopted a resolution to a certain effect, indicating that such and such provisions were offered by that committee for the purpose of inclusion in the code, and then it never appears in any supplementary code, or in the code itself.

In some cases the minutes show a clear abandonment. In other cases, you must infer the abandonment from the fact that it didn't appear. But all of those discussions, and all those agreements, if you want to call them such, were discussions with respect to the inclusion of a certain provision or provisions in the code, and the agreements were not agreements to do these things, they were agreements to have a provision such as this go into the code.

Now, there is a great difference, because Mr. Wright's position is that we discussed them, they didn't find their way into the code, but we agreed on them anyway. I say there isn't a scintilla of evidence to justify that; that it is plain on the face of the minutes, it is plain from the uncontradicted testimony of every witness, that they were discussed for code purposes only, and that they were not the subject of agreement only to the extent of agreeing on them to go into the code. Of course, I could repeat myself on this subject ad nauseam, but I am not going to—if
4317 I have not done so already—but I think it is of somewhat importance in this case.

Now, before I leave the subject of Lead Industries, there are one or two other matters that I want to direct your attention to. In the first place, there has been a suggestion that an effect should be given, or a recognition taken, of

an attitude expressed in one way or another with respect to the anti-trust laws.

The record indicates that Mr. Cornish, then, I believe, president of National, stated publicly that he did not think the N. R. A. was going to last, and that the anti-trust laws were still on the books, and that they should be lived up to; and a more or less similar statement appears in the record in another form.

That would indicate to my mind an awareness of the fact that, regardless of the N. R. A., regardless of whether you were a protagonist of the N. R. A. or a reluctant associate with it, that these people did not intend to violate the anti-trust laws.

A different interpretation is now suggested, and that is that they were aware of the anti-trust law, and they thought they had found a way they could get around it. Everyone is entitled to his own view, but to my mind that consideration suggested is wholly unpersuasive, for this reason: These people may not have been the smartest people in the world, but at least they were, generally
4318 speaking, successful business men engaged in the operation of large business enterprises, and to suggest that they would plaster their record with statements of that nature and then stick their necks out in a wholly obvious way, is just incredible to me. I just cannot believe such a thing would happen.

Now, I do not say that, whatever their intentions were, that they might not have been successful in violating the anti-trust law, but I do say you cannot infer from their previous allegiance to the anti-trust law, an intention to in fact violate it.

Second, when N. R. A. was declared unconstitutional, the Lead Industries Association and the Pigments Division in Memphis wound it up just as fast as they could, and you can almost hear them saying "Good riddance."

And then in November, 1935, the Coordinator for Industrial Cooperation, a Mr. George L. Berry, who, apparently, was in charge of activities by some organization to perpetuate by voluntary means in industry practices that had met with approval under the N. R. A., approached the Association with such a suggestion, and they turned it down flatly, as appears from the resolution which is in evidence as part of, or is in evidence as Respondents' Exhibit 92.

Trial Examiner Norwood: Was he the attorney that they consulted?

Mr. Ewing: No. He formerly, I believe, had some
4319 connection with N. R. A., but at the time he wrote Lead Industries in November, 1935, he was Coordinator for Industrial Cooperation, whatever that may be, and he wrote them asking them to come down to discuss and consider voluntary action to continue the N. R. A. activities.

Now, when the Lead Industries Association received that request, the executive committee met, and adopted this resolution, to which I have referred; and the substance of the resolution, after recitals, the final recital in this resolution reads as follows:

"Whereas, the Lead Industry has made greater progress out of the depression from the standpoint of both employer and employee since the termination of the N.R.A. than it did before, Now, Therefore, Be It Resolved, that it is undesirable for the lead industry as a unit to send a representative to the meeting called by Mr. George L. Berry, to be held in Washington on December 9, 1935."

Now that is a plain indication, as plain as it can be, that they wanted no part of the N.R.A. in any substitute form, and to my mind it leads directly to the inference, or directly supports the contention we make with respect to the nature, character and activities of the Association and its members.

Now, I think you can say that the Commission's case contains the suggestion that you had an industry
4320 which was going along, operating—perhaps the contention is that it was operating more rigidly than prior to 1891, as I mentioned earlier, but that when you got to 1933 and N.R.A., you had an overturn, and things were all different. The facts just do not bear that out. I am not going to go into the detail, because that is going to be covered by Mr. DuBose, but I mention it, because some of the things I am now coming to discuss bear on my point at the beginning. I said that the agency method was one of the big factors here.

My recollection of the testimony is that International Smelting and Refining had a so-called consignment method, commencing early in 1932. In 1932, National adopted on a local basis the so-called agency method. Under the agency method, title remained in National. It experiment-

ed with agency, and it determined to, and did, effective as of November 15, 1933, go on agency on a nation-wide basis, except for the Pacific Coast, which never had it.

Now, there isn't any dispute about the fact that Eagle went on an agency plan in substance of the same character. There isn't any dispute about the fact that National's officials discussed it with Eagle, and there isn't any question about the fact that we told Eagle we were going to go on it in advance; on November 15, 1933.

Where is the vice? The cause—and I think it is perhaps indicated in the record that there was some reluctance
4321 about adopting agency—but the cause was an industry evil, and that was loss leadership.

Now, that was particularly important to us, because here we had as the result of years of business established our Dutch Boy label to the point where it had the highest degree of consumer acceptance, and that it was recognized in effect as a premium product. Its competitive position was entirely different from the admittedly inferior brands of some competitors. Anything that the mind could devise to stop the practice of having dealers use Dutch Boy as a loss leader was something that was to be given consideration by National. Of course, it is something that is given consideration by all kinds of businesses, because the problem is not confined to lead pigment.

Certainly, there can be no reason why National could not have, in and of itself, adopted an agency method, provided it fell within the law, if it wanted to. There was no reason why Eagle could not do it if it wanted to. There was no reason why Glidden could not, as it did—did it with reluctance, and then quit.

I cannot see the basis for an inference because of the fact that two or three companies discussed this thing and decided for the obvious economic reason to use it. It is clear from the Code minutes that at one meeting National's representative came right out and said "We are
4322 going to do it. Here is the way it is." And some said they thought they might do it, too.

Now, one reason, as you know, for National and others fighting the attempt to bring them under the paint and varnish code, was the fact that the paint people were unalterably opposed to consignment, and, if their code prohibited consignment, why, that, at least, was not a possible solution to the loss leader problem. In any event, there is no agency now.

Second, zones. Now, Mr. Wright stated, at least last week, and he may have said the same thing before, that his point in connection with zones doesn't rest upon the existence or non-existence of a map, it is because the fact is that what we have called a zone method involves the territorial system of selling whereby certain territories take a differential higher than the so-called par territory.

I quite agree with him that the existence of a map, or the non-existence of a map, while it may be a factor of some sort, certainly doesn't determine whether you are doing business on a zone basis, with uniform delivered prices in the particular territory and with advancing differentials as you come to changing lines.

We have testimony in this case—before I come to that, there is testimony in this case that indicates that National and the others who did use maps, took to the map
4323 form of expressing the zone territorial method of sale and distribution some time between the fall of 1933 and June of 1934. When that occurred, except as between those dates, it is impossible, I think, for anyone to say, but it certainly occurred.

Now, take National's case. McNair, who was manager of the Atlantic Branch dating back to 1910, testified that ever since he knew, National had always used a territorial method of selling which involved the use of differentials. He didn't purport to be able to tell you the details of it, but he was positive in his testimony on it.

Then there is in evidence the exhibit—the number of which I can never remember, which sets forth National's branches, delivery points, differential and equalization points. I think it is 659.

Mr. Wright: 659.

Mr. Ewing: 659. I am not going to attempt to go into or waste your time here with an explanation of the differential delivery point system, but we do know that by 1930—this exhibit dates back to 1920—we do know that by 1930 there were better than 500 points. Now, we took those points, and superimposed them on a map, and the result is startling, and wholly confirmatory of Mr. McNair's testimony. If you will look at the territories that are determined by the point system, if you want to call it that, as against the map, I don't say it fits like a glove, but it
4324 is very, very close.

Trial Examiner Norwood: That is a respondent's exhibit, is it not?

Mr. Ewing: That is right. It is our map—Respondents' Exhibit No. 147. Now, I think the fair inference—first, I should say I think the evidence is very clear that National in substance, even though it first came up with a map some time between November, 1933 and June, 1934, in substance used a zone or territorial method of sale which involved differential territories, at least since 1910, and there is every reason to believe since long before that. So that the actual use of a map, whenever it occurred, had no particular significance, and didn't represent a chameleon change of color from before 1933 and after.

Trial Examiner Norwood: When they sold from those delivered points, did the customer pay the freight from the equalization point to his location?

Mr. Ewing: If he were a customer located at a point other than a delivery point, he would pay the freight differential, but most of the delivery points were big cities, and most of the business, of course, was done there.

Trial Examiner Norwood: That is the same system that Sherwin-Williams now apply, does it not?

Mr. Ewing: Well, not quite, no. But I will let him point out the difference in his system. Therefore, I say as a practical proposition that the record establishes
4325 that we have been doing business in substantially the same way. In what I have just been talking about, I should limit to white lead and oil. With respect to dry white lead basic carbonate, National divided the country into two zones, east of the Rockies, and west of the Rockies. Sprague testified, as I recall it, that prior to 1933 the West Coast had carried a differential. In any event, the division as between west coast and east, is not an arbitrary one, obviously, and it is not unrealistic, or anything like that.

Oxide, zones. There again, you have a map, but the record indicates very plainly as to how those oxide zones were set up by National. It is true that during the code meetings there had been discussions of that subject, and that zones were a matter which never found their way into the code.

While the code was waiting for approval, in the late spring of 1934, National sent a letter to its branch managers, which has been referred to before, and that is Harold Rowe's letter of May 11, 1934, Respondent's Exhibit 159-B. That makes it very clear that National at that point de-

cided to have zones and to adopt and put into effect the terms and conditions of sale which were found in the proposed code subsequently approved. And he states plainly that that is what they were doing. I think the only inference that you can draw is that National independently decided then that it wanted oxide zones and was going to use these terms and conditions of sale, and that it
4326 was doing it regardless of what anybody else did.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. Ewing: Now, what I have said with respect to the adoption by National of oxide zones, is true with respect to the adoption of the so-called uniform terms and conditions of sale, which were covered by the same memorandum. In view of the fact that both of those subjects are going to require more discussion by Mr. DuBose, I am not going to burden the record with further comment on them.

On the question of price, there isn't any doubt about the fact, as I have said, that lead being the principal material component, the price of lead is the principal factor by way of material cost affecting price. And we all know that in the case of litharge and red lead, the custom of the business has been to sell those products at a fixed differential over the current market price of pig, and that as that market price varies, depending on the quantity, you get a variation in the price of lead pigment to oxide.

The record shows that National adopted that differential method of selling the oxides back in 1927. It didn't come into being, it wasn't new, and followed after the code days —they adopted it in 1927. Now, the price being what it is, and the nature of the oxide product being what it is,
4327 it is almost inevitable that the differential method of selling it was involved, because otherwise, the industry would have had a hard time in pricing.

Dry white lead, being sold in large quantities to large paint manufacturers, generally speaking, reflected fewer price changes than any of the other products. White lead and oil consistently reflects the price changes in pig lead, but with a lag, and, of course, there are other factors in the pricing of white lead and oil, such as the cost of the linseed oil, and so forth.

Why is there a lag in the case of white lead and oil?

Well, white lead and oil represents a product with respect to which there are a large number of small outlets, and, as I say, as distinguished between dry white lead, which is a quantity proposition, you have a very narrow margin. It is obvious there is some profit in the case of red lead and litharge. I don't know whether you can figure it or not, but Mr. Wright pointed it out the other day, and I think the same is true with respect to all of these products. There is a greater spread between the painter price, because for all practical purposes there were no direct customer sales.

In the case of white lead and oil and the price of pig. Under the Old Dutch process, it took 120 days to corrode your lead, with the result that from a pricing standpoint, you had all of that stock in process, as well as raw
4328 material on hand and finished goods coming out. Under the Carter process, the time is reduced to ten days, I believe, so that the amount of material tied up in process is not the same. But in the case of each product, the price of pig certainly has a very definite bearing and relation to the price of the product, and as the price of pig changes and reacts, there is a reaction in the price of the product.

I repeat that in the case of oxides, the margin is very small, and the margin, I think it is fair to say, is small in the case of dry white lead, and white lead and oil, although it is a little larger. But the prices vary, and they reflect the price of the principal raw material ingredient. So that you have not got here a case of rigidity in price not reflecting the true underlying market condition. And I think that is a very important factor.

Now, there is just one other subject I want to mention briefly, and that is reverting to the suggestion that the respondents here have no protection from the provisions of the National Industrial Recovery Act.

Entirely aside from my contention, which I believe the evidence establishes, that there were no agreements except for standard code prices, any person carrying out a provision of that code is entitled to protection. I certainly think that it cannot be disputed that industry representatives when they were considering the formulation of
4329 codes, could discuss any matters they wanted to with absolute and complete freedom. When they came in this case to the point of having a code, they included a

price reporting provision and a provision at least permitting the use of uniform terms and conditions of sale. I say at least permitting, because I can see room for the contention that the provision was mandatory, although the particular provision does not so state itself.

What happened? The code was approved, and they asked to be relieved from compliance with those provisions, and they were given three months' relief. They asked again, and the record indicates that they never did attempt to comply with those provisions. There was no price reported.

Now it is contended that since we didn't have to comply with the provisions relating to terms and conditions of sale, anybody who did anything can't claim protection because they weren't carrying out the terms of the code.

Now I say that the code was there. The mere fact that we might have been given relief, or had it held in abeyance, that there is an exemption, doesn't lead to the conclusion that there was no code provision, and that because he did this he had no protection.

That, as I say, is entirely aside from the argument that I earnestly urge, that National adopted a uniform standard of terms as its own independently and without agreement, but I do not see how they can blow hot or cold on that point.

4330 That concludes my part of our presentation.

Mr. DuBose: Your Honor, these first few matters I am going to take up for the most part involve perhaps minor corrections to the proposals as submitted by Mr. Wright.

I call Your Honor's attention to page 4 of the proposed findings and conclusions of counsel for the Commission, and the first paragraph following the list of cities, the first sentence, which states: "National is by far the largest producer and seller of lead pigments in the United States," and then he sets up the white lead and oil percentages, and the next phrase is: "About 50 per cent of the dry white lead."

Now, actually, that is incorrect. McCarthy, who was manager of trade sales for National, stated that according to his recollection for a great many years National's percentage of dry white lead sales and shipments was approximately 30 per cent.

Now that is transcript, page 1665, in addition, Commis-

sion's Exhibit 664, which shows the percentage of National's dry white lead basic carbonate sales for 1940, 1941 and 1942, shows that those percentages varied between 35 and 37 per cent.

Now, on page 5 of the proposals of Mr. Wright, at the middle of the page, reference is made to the alleged negotiations during 1902 between National and the well-known Messrs. Thomas Fortune Ryan, Daniel Guggenheim, et al. looking to the purchase of certain properties. And
4331 at the bottom of that page reference is made to Commission's Exhibits 5-B and C, which were the minutes of a special meeting of the board of directors of National held December 11, 1902.

It is true that at that meeting the purchase of those properties was authorized. Now on page 6 of Mr. Wright's proposals, the first line, it is stated: "These negotiations do not appear to have been completed."

Well, in the first place, the minutes don't show negotiations as such. There was an authority to purchase. Actually, that authority to purchase was rescinded, as is clearly shown in Commission's Exhibit 6-C, which is a portion of the minutes of the adjourned regular meeting of the board of directors of National, held on January 22nd, 1903.

Trial Examiner Norwood: Authority as to this list on page 5, that was rescinded?

Mr. DuBose: That was rescinded.

Trial Examiner Norwood: On C-Ex-6-C?

Mr. DuBose: On Commission's Exhibit 6-C. Now, Mr. Ewing has already brought out the facts with respect to the stock purchases, and so forth, by National, in Eagle Picher, and I just want to point out that the stipulated facts with reference to the proposal in May, not June, 1931, as listed there, appear at pages 4182 and 4183 of the transcript.

We begin on page 9 of the proposals by counsel for the Commission to come to the first, you might say, im-
4332 portant inference or implication which counsel seeks to put into his proposals, most of which, we will demonstrate, are wholly unsupported or directly contrary to the reliable probative and substantial evidence.

I refer on page 9 to the last sentence of the paragraph under the heading "American Smelting and Refining Company," where it is stated that the position of the AS&R, as that company is called by all the parties here, in the

domestic lead market, and its dominance "is demonstrated by the fact that the respondents herein agreed to use its daily quotations of lead prices as the sole basis for quoting spot carload prices on red lead and litharge."

I take it that the inference there is that not only was there an agreement, which in itself would be illegal, to use AS&R's daily quotations, but that the amounts to be added to AS&R's pig lead quotations is sought to be inferred.

Well, reference is made to Commission Exhibits 809, 615, and Respondents' Exhibit 137. Now, Commission Exhibit 615 is a notice from the home office of the National Lead Company to its branch managers, pointing out that on carload quotations for government, municipal, industrial, rail, steamships, and so forth, National itself was using a straight differential over AS&R's pig lead quotations. The other two exhibits relate to the code, one of them being the code itself. Respondents' Exhibit 137 is the minutes
4333 of the meeting of the Lead Oxide Committee of the Lead Pigments Division, held on December 14th and 15th, 1933, which was one of the meetings at which terms for the supplemental code covering lead oxides were discussed. Commission's Exhibit 809 is the code itself. In Schedule A, Articles 1 and 2 contain the conditions for sale of lead oxides, as to both less than carload, and carload lots.

And, as Your Honor pointed out last Wednesday, with respect to the carload differential over pig lead, article 2 of the code itself states that the differential shall be "as agreed upon by buyer and seller," another indication that the lead pigments industry, unlike almost every over industry in the country in 1933 and 1934, did not want price fixing, even in a code.

Trial Examiner Norwood: Well, as I read that proposal there, it was merely cited to show American Smelting and Refining Company's importance in this price structure here. So if that wording were changed there, would that be satisfactory?

Mr. DuBose: I should think so.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. DuBose: Now, on page 10 of counsel's proposals—and when I throw this out and refer to counsel's proposals, I mean proposals submitted by counsel for the Com-
4334 mission, in the matter of the first full paragraph, which is just before Part II, page 10, it is stated that

the respondents between them account for a substantial portion of the production of competing products, that is products which compete with these lead pigments.

Now, there is really no proof in the record as to just what portion of these competing products the particular respondents produce, that is, of pigments, other than those mentioned in the amended complaint, although it is true that Glidden, through its own vice-president stated that it was one of the largest producers of lithopone.

However, when you come to perhaps the most important competing product, such as leaded zinc oxide, true, Eagle-Picher stressed this—but there are no per cents in the record, and I take it that there wasn't any claim that there was any such proof.

Then we come to the next to the last sentence of the same paragraph, in which the statement is made that the National Lead and DuPont "have recently been found to have a monopoly power in production and sale of titanium pigments, which are also produced and sold by Glidden through its subsidiary, American Zirconium Company."

There is nothing in the record with respect to this alleged recent finding, but I suppose that counsel wishes the Trial Examiner to take official notice of the recent
4335 decision of the Supreme Court, affirming a decree of the Southern District of New York Federal Court—United States *vs.* National Lead Company, which is reported in the Advance sheets, 332, U. S. 319.

Now, actually, if official notice may be taken of that case by the Trial Examiner without proof of record in that case, actually, that case dealt with cross licensing of patents and a cartel arrangement, and the lower court in denying divestiture by National and division of certain of its plants, held, and the Supreme Court reiterated that holding, that in the absence of these restrictive cross licensing and cartel arrangements, healthy competition would be fostered in the industry. The court, particularly at pages 347 and 348 of Volume 332 of U. S. Reports, and again at pages 351 and 352, points out that even with these restricted agreements between National and DuPont, there was still active and healthy competition between those two. And it also points out that the two other producers not involved had increased their competition while this arrangement was going on. So that the court concluded that this was not a proper case for divestiture, which the Government was

seeking to have the Supreme Court decree to be proper, because they stated—

Trial Examiner Norwood: Well, I would like, before full argument on both sides, to be shown the relevancy of that matter.

4336 Mr. DuBose: I suppose it is this: By making that statement, counsel for the Commission was saying that National, while it is true that its lead pigments compete with other products, nevertheless had a monopoly power in one of these competing products, namely, titanium.

In that connection, Your Honor will recall that in the 1946 St. Louis hearings, one of the paint manufacturers from St. Louis pointed out that in the early '30's, when titanium first came on the market, it was very high priced; prices had been reduced; they had found that it was better in some respects than basic carbonate of lead, and that it was being used more and more to replace basic carbonate of lead.

And I suppose counsel's contention is there, "Sure, you have these competing products, but you control those two," and I just wanted to point out that that record in that anti-trust case is not before the Trial Examiner. But if you can take official notice of it, that statement that National and DuPont had monopoly power, is contrary to the direct holding in that Supreme Court case.

Trial Examiner Norwood: We will recess to 1:30, and we will reconvene in room 332, on this floor.

(Whereupon, at 12:10 o'clock p.m., a recess was taken until 1:30 o'clock p.m. of the same day.)

4337 Afternoon Session.

1:30 p.m.

Trial Examiner Norwood: The hearing will be in order. You may proceed, Mr. DuBose.

Argument of Mr. DuBose (Resumed).

Mr. DuBose: Your Honor, before we go into the merits of counsel's proposals, and not in a spirit of criticism, we would like to say that in our opinion the proposals of counsel for the Commission hardly meet the requirements of the Rules, as we understand them.

We understood, and attempted to set forth in our proposed findings—and I speak for all Respondents there—numbered findings of fact, some evidentiary, a lot of ultimate facts, and referred therein to the record, made concise conclusions of law, and attempted to give our reasons for both at the end.

In reading counsel's proposals, however, we are faced with a mixture of all three intertwined, and I say we don't say that in any spirit of criticism. We all were working against time, but it has to some extent made our work of reply a little more difficult.

Now, before I leave our proposals, the proposals of respondent National, perhaps in some instances we have cut a few corners and made flat statements that there
4338 was no agreement; there was no conspiracy. In so doing, of course, we meant that the record contained no evidence, and no substantial, probative and reliable evidence that those ultimate facts existed.

So, as I say, in a non-critical spirit we point this out, which will explain perhaps the rather voluminous reply that was necessitated by the manner in which counsel's proposals were given to us.

As we understand the new Administrative Procedure Act and the new rules of the Federal Trade Commission, under both of which this proceeding is being heard, the evidence necessary to support either proposed findings or the findings that are finally made must be reliable, probative and substantial, and that counsel in support of the complaint under the Administrative Procedure Act has the burden of proof; under the new rules of the Federal

Trade Commission must support them by the greater weight of such evidence, namely reliable, probative and substantial evidence.

Inferences can be drawn only from such reliable evidence. Inferences cannot in turn be based upon inferences. Nor can an agency in arriving at its informed expert judgment neglect to found that judgment on the substantial evidence in the case.

In Part 2 of his proposals, counsel begins what I imagine he would view as the crux of his case. In Part 2 the
4339 attempt is made to show that before 1933 the lead pigments industry was characterized by deviations among the various manufacturers as to practices and methods of sale; but that after 1933, under the guise and cloak of forming a code, the Respondents set forth a rigid system.

Now, counsel states that the recollection of witnesses as to practices prior to 1933 was very vague. Necessarily, much of the parol testimony was vague even as to a few years ago, since 1933; but we believe that the evidence clearly shows that as a general matter the same pricing practices have obtained in the lead pigments industry for years prior to 1933. Some of the price cards prior to 1933 substantiate this.

Respondent's Exhibits 154-A to I, which was a tabulation that was gotten out by the witness Tibbetts showing the relationship between common pig lead prices New York and the prices of the various pigments, substantiate that statement.

Perhaps next to McNair, the one witness who had a more intimate connection with the industry prior to 1933 was Mr. Sprague, who in 1924 and 1925, upon the acquisition by Glidden of Houston Lead, went into that plant to run it. He testified as to the pricing practices then in effect. He showed that the market leader then, as now, was National Lead Company, based largely upon the amazingly
4340 successful consumer acceptance that the Dutch Boy label had established for itself among master painters in this country, who handed down their knowledge of this particular product from generation to generation.

There was the same practice prior to 1933 of selling white lead in oil and dry white lead on the basis of territorial differences in price.

Prior to 1933, oxides were sold on what might be called

a territorial differential basis, because on distant shipments, as Mr. Carroll testified, where the freight was more than 25 or 50 cents, freight was added to the price on carload shipments, and on l.c.l. shipments freight was charged in addition to price from certain designated warehouses.

The attempt has been made to show that from 1933 on, oxides were sold on a flat differential over pig lead; litharge at a dollar and a half for carload quantities, red lead at two and a half dollars over pig lead.

The minutes of the National Lead Company Board of Directors of May, 1927, show that National Lead then established that differential of a dollar and a half and two and a half—in 1927, six years before 1933—and at the same time established minimum card prices on l.c.l. shipments of two and a half dollars and three and a half dollars respectively.

So what do we come down to? As Mr. Ewing
4341 pointed out this morning, the complaint seems to be that regardless of this general pricing schedule and system as we have seen, which went back to the beginning of the industry, nevertheless, certain changes were made which found their way into Schedule A of the Code.

You adopted agency, and you adopted zones.

Trial Examiner Norwood: But the agencies and zones didn't get into the supplemental code, did they?

Mr. DuBose: They were discussed, and as the Commission's own proof shows—Commission's Exhibit 505—in the meeting in October 1933, freight and zoning problems were discussed without any understanding or agreement being made. That is the Commission's own exhibit.

The minutes do not again refer anywhere to zones for white lead in oil, which was the subject of that discussion. We say the Commission can't ignore its own substantial, reliable and probative evidence.

On dry white lead, counsel—on page 12, and in other places in his proposals—states that apparently prior to 1933 there was a lower differential on the Pacific Coast for dry white lead, and he refers to the cross-examination of McNair and the ancient documents that McNair had in preparing his schedule of selling practices.

The reference there was to a price card of 1924, and it
merely shows that in certain quantities at that time
4342 there apparently was a lower differential for both white lead in oil and dry white lead on the Pacific Coast.

However, Sprague was definite in his recollection that prior to 1933 there was a one-quarter cent differential for dry white lead, prior to 1933, and that is also a reasonable inference to be drawn from certain other testimony.

Trial Examiner Norwood: Now, how does that bear on the issues here?

Mr. DuBose: Very much so.

Trial Examiner Norwood: —as to whether they were selling lower or higher on the Pacific Coast?

Mr. DuBose: Well, our contention is that dry white lead prior to 1933 was also sold on a higher differential on the Pacific Coast, and that the only change made in June 1934 by National itself was the addition of four other states to that Pacific Coast Zone—New Mexico, Colorado, Wyoming, and Montana.

As counsel for the Commission points out, in December 1933, National Lead Company resolved to adopt the terms and conditions of sale in Schedule A for dry white lead basic carbonate beginning January 1, 1934, some five and a half months before the Code was approved, and that appears in the minutes.

Nowhere is any mention there made of selling at a quarter of a cent higher on the Pacific Coast. There was
4348 a quantity discount carload and less than carload, so that when we come to June, and Respondent's Exhibit 159-A, which was Mr. Rowe's letter to the branch managers of National of June 9, 1934, in the second paragraph it said:

"On dry white lead, a difference of one-quarter cent per pound has been added to the par price in those four states," which would tie in with Sprague's recollection that there was only a modification in 1933-1934 of the dry white lead zones.

Mr. Ewing has also pointed out that the white lead in oil zones for all practical purposes went back to 1910, so we are left with oxide zones and agencies, and the terms and conditions set forth in Schedule A.

Before we get to that, we might look into the claim beginning on page 12, the bottom thereof, of counsel's proposals, in which it is stated that for the ostensible purpose of considering and drafting a supplementary code, the Respondents met together in the fall of 1933.

What are the contemporary documents aside from the parol testimony?

In the first place, here are Respondent's Exhibits 50-K and L, which was a letter dated October 2, 1935—before this case was ever heard of—sent by Mr. Wormser of Lead Industries Association to Mr. Marshall, who was a director of the Division of Review of the NRA, which was
1344 winding up its affairs, and who wanted a lot of information from the Lead Industry as to how the Code worked there and what was back of the Code, and so on. He had a long list of questions that he sent.

The Board of Directors of Lead Industries Association met and authorized Mr. Wormser to send a letter dated October 2, 1935, to which I have just referred, in which, among other things—it was stated:

"In general the members of the lead industry were not of the opinion that a Code under the National Industrial Recovery Act would materially help the lead industry, but pursuant to urgent representations by National Recovery Administration officials, steps were taken to draft a code for the industry."

Respondent's Exhibit 50-O, which is a letter dated the day after—or rather before—October 1, 1935, sent by Mr. Wormser to Mr. Janssen, who was a Deputy Administrator in charge of the lead code of NRA, reads:

"Answering your telephone inquiry as to the reason for the suspension in the operation of Section 2 of Article VII of the Lead Code, you will recall the history of this particular section.

"The Pigments Division had mixed feelings from the start about the advisability or need of incorporating an open price provision in the Code. The section was
4345 included only, I think it fair to state, at the insistence of NRA, which strongly endorsed the proposal. Upon approval of the Code, however, the Pigments Division felt that the lukewarmness of some members made it desirable to postpone the establishment of this practice and to request a suspension until full agreement had been reached."

In Respondent's Exhibit 81-A to C, which are minutes of the Executive Committee of the Lead Industries Association held on September 21, 1933 during the code period, the Chairman called attention to the fact that he had received the following communication from the NRA, and this is a letter from NRA to the Chairman of Lead Industries Association, Executive Committee:

"In conversation with you on September 11 it was our

understanding that you would file supplemental codes to the basic lead code not later than September 16.

"We beg to advise that up to this date we have not received these supplementals and are asking that you give this your prompt attention."

That was signed by H. O. King, Deputy Administrator.

The Lead Industries Association replied that they were working on them and hoped to have them in shape.

Now, what do these documents establish? That the
4346 Respondents under the guise and cloak of meeting the requirements of the NRA met to form an illegal conspiracy?

That insinuation flies in the very face of the documentary evidence, and that documentary evidence is fully supported by the clear and convincing testimony of Mr. Wormser, who stated the same thing, that they didn't want codes, but did it at the urgent insistence of NRA, and of the other witnesses who testified as to those meetings.

Then in Part 3, which runs from pages 13 to 28 of counsel's proposals, we come to the crux of his case.

Trial Examiner Norwood: Just a minute. Cite me that documentary evidence you are talking about there.

Mr. DuBose: Respondent's Exhibit 50-K and L; 50-O; 81-A to C, particularly 81-A and B.

Trial Examiner Norwood: All right.

Mr. DuBose: There may be others; we don't say that is all.

In Part 3 counsel comes to what he apparently regards as the crux of his case, and that is entitled "Cooperative activities (1933-1934)."

As we see it, his position comes down to three propositions:

First, that under the guise of drafting supplementary codes we met and formed illegal agreements. I think
4347 we have fully answered that.

Second, that some of the agreements did not find their way into the Code, and therefore were not protected by the exemption from the anti-trust statutes which is provided for in Section 5 of the NIRA.

What are these so-called agreements? They are listed on pages 26, 27 and 28 of counsel's proposals, beginning near the bottom of page 26, and they are numbered 1 to 14.

Since that apparently is the crux of his case, let us look at those alleged agreements.

The first is to sell white lead in oil and keg products on the basis of territorial differences or zones. We have shown that as far as white lead in oil is concerned that that went back to 1910, so that can be disregarded.

Second is to sell white lead in oil on the basis of consignment contracts, and even in this counsel has to state "except that Sherwin-Williams and Glidden did not take part in this understanding."

Well, Mr. Ewing has fully covered that agency situation, and all I want to do is to show this: that National started this thing for itself in 1932, before the NIRA was passed. They found it was a good method around New York and in the east to get rid of this vicious practice of using Dutch Boy as a loss-leader so they could sell what we claim
4348 are some of the inferior products of some of these other respondents.

Trial Examiner Norwood: Why did the others do it?

Mr. DuBose: W[illegible]v did the others do it? Which one did it? Eagle-Picher [illegible]e only other one that did it. They had an Eagle brand that was being kicked around, too, but we didn't care what they did with their Eagle brand. We were going to protect our Dutch Boy brand.

It is perfectly obvious that there was no agreement among the respondents.

Trial Examiner Norwood: Well, didn't International?

Mr. DuBose: Never. International, before we even started agencies, had a consignment arrangement, not an agency.

Trial Examiner Norwood: And Glidden didn't come in until '39?

Mr. DuBose: Glidden tried it. As Mr. Sprague testified, their salesmen thought that would be another method whereby they could sell their product. They tried it, but they didn't sell any substantial part. It was a headache to them because of the mixed paint situation, and they dropped it.

Trial Examiner Norwood: Thank you.

Mr. DuBose: Both Sherwin-Williams and Glidden
4349 at these meetings were violently opposed to the consignment feature.

Now, here is Commission's own Exhibit 505-A, which was a meeting of the White Lead in Oil Committee of October 28, 1933. The same exhibit which shows there was no agreement on white lead in oil zones also shows this:

"The Chairman described a new agency system which the National Lead Company was putting into effect—"

And, by the way, the Chairman was Mr. Carter, I believe, or Mr. Rowe of the National Lead Company.

"—for the sale of its lead in oil products, stating that it was an adaptation of a method used by General Electric and other companies, and was designed to correct destructive price-cutting in the white lead in oil business which had seriously affected the marketing of the product. Some other members stated that they, too, were planning to use the consignment system."

We know of no law or any principle of law in the cases which prohibits one competitor from telling any other competitor of a legal method of getting rid of what, from the manufacturer's standpoint, is an economic evil.

In that connection, the agency method of the Gen-
4350 eral Electric Company had at that time received Supreme Court approval in, I believe, 272 U. S., and it is referred to by the Chairman there.

Now, Number 3 is to sell lead pigments in kegs and cans at uniform container differentials. Well, I don't know any proof to show that that started in 1933. Perhaps there is. I don't know.

Number 4 is an agreement to eliminate and refrain from permitting guarantees against declines in prices upon lead pigments packaged in kegs or cans, and red lead and litharge in less than carload lots.

Well, as far as red lead and litharge in l.c.l. lots is concerned, Schedule A of the Code itself in Article I, Subdivision B(4)(c), states that no protection against decline in seller's price may be given.

Trial Examiner Norwood: Was that in the supplemental code that was suspended and never put in operation?

Mr. DuBose: I will come to that in a moment. It was in the Code, suffice it to say for the present.

Fifth is to sell dry white lead on the basis of differentials in zones. We have just shown that prior to 1933 apparently dry white lead had a higher differential on the Pacific Coast.

Sixth is to sell dry white lead upon uniform discounts with a uniform addition to price quotations for de-
4351 livery in lots of less than twenty tons. That is specifically provided for in Article III of Schedule A,

Subdivision B(2)(c), which provided for the quarter cent differential for carload lots.

Seven is to eliminate and refrain from entering into contracts to sell dry white lead at a stated differential over the price of pig lead.

In that connection counsel has referred to certain price cards of Eagle-Picher, or certain price data of Eagle-Picher which apparently shows that Eagle-Picher at some time had sold on a differential basis. Again Article III of Schedule A shows that the price shall be the seller's price on the date the contract is made.

Eight and nine deal with oxide zones, and we maintain that Respondent's Exhibit 159-B to J inclusive, which is the letter from Harold Rowe to the Branch Managers of National—not to the other Respondents—shows that National Lead, in connection with Articles I and II of Schedule A was going to set up oxide zones on its own, and evidently the others followed that, since National Lead was the largest producer. They were glad to get a higher price in those distant areas since they didn't have plants there.

Ten is to eliminate and refrain from entering into contracts to supply red lead and litharge in quantities
4352 less than twenty tons at a stated differential over the price of pig lead. Well, I don't know what that means, because both before and after 1933 on l.c.l. shipments of red lead and litharge National, beginning in 1927, charged customarily a differential of two and one-half cents and three and a half cents.

Trial Examiner Norwood: Isn't there something in the complaint charging you with doing that?

Mr. DuBose: This is what counsel says the evidence in 1933 shows that we agreed to at that time. I don't know how in 1933 National could agree to eliminate and refrain from entering into contracts on l.c.l. red lead and litharge at a stated differential over the price of pig lead when it did it before that time and has done it since on the same basis.

Eleven is to quote and sell red lead in quantities of less than twenty tons on the basis of price cards to go up and down when pig lead fluctuates as much as twenty-five cents.

Well, Article I of Schedule A again said that the seller's price shall be the card price, and as far as I know that has always been the situation, the card price. We have got card prices on red lead and litharge on l.c.l. shipments going back to antiquity.

Twelve—and as far back as the twenty-five cents a
4353 hundred, there is no showing when that started. Both
Zoller and Merson said that is customary, but whether or not it is customary before or after, we don't know.

Twelve is to quote and sell red lead and litharge in twenty-ton quantities on the basis of an S&R price in New York on these stated differentials, a dollar and a half for litharge, litharge seventy-five per cent, $1.75; and ninety-five per cent red lead, $2.50; ninety-eight per cent, $3.00.

Well, the basic litharge and red lead, ninety-five per cent red lead of $1.50 and $2.00 again we say was established by National itself in 1937 and the record so shows. I don't know when the record shows as to seventy-five per cent litharge and twenty-five per cent red lead. However, Article II of Schedule 5 provides for the differentials for ninety-seven per cent red lead and ninety-eight per cent red lead in Subdivision B (5) (d), which says that ninety-seven per cent or ninety-eight per cent red lead shall be marked on the package and "shall be sold at not less than one-quarter cent and one-half cent per pound irrespective of the seller's price for the grades of lower red lead content."

Thirteen alleges agreement to fix arbitrary alleged discrimination between carload, five ton, and less than five
ton purchases of oxides on certain stated differen-
4354 tials. I will go to the differentials first; two litharge
two and one-half over pig lead, and ninety-five per cent red lead of three and one-half again were established by National in 1927. In both carload and less than carload, the Schedule A did make a change because there it provided that the New York price would govern to which a differential as agreed upon between buyer and seller would be had, while prior to that it had been National's custom to permit Chicago and St. Louis to sell on their pig lead.

The five-ton differential is the only thing added there. Prior to 1933 we had a carload and less than carload of a cent. The five-ton differential for oxides is set forth and provided for in Article I of Schedule of the Code in Subdivision B (4) (a) (1). That brief says that in less than carload lots, oxides shall be sold at a price which are the seller's card or quoted price in effect on the date the order is received with an allowance of not more than one-half cent per pound for minimum shipments of five tons.

Trial Examiner Norwood: Well, are there any differ-

ences in costs shown, costs of delivery and so on as between five ton and less than five ton?

Mr. DuBose: Not any specific showings as such, not as we showed, for instance, in connection with the white lead in oil zones and as we showed in dry white lead.

4355 On that five ton, Mr. Roe in his letter of May 11, Respondent's Exhibit 195-B, said that the five ton price is being induced to take care of the medium size buyer who is unable to meet the twenty-ton requirement but is entitled to something better than the occasional users of the single barrel, which is provided for as I say in Schedule A.

Fourteen is an alleged agreement to establish arbitrary prices, terms and conditions of sale applicable to sales to customers classified as "Government," railroad, steamship lines and industrial.

As far as Government contracts are concerned, if any such agreement were ever made, Respondent's Exhibits 306 to 308 dealing with Government bids on red lead, litharge, dry white lead and white lead in oil in quantities from ten thousand to a million pounds, shows that that agreement was not followed, to say the least. I know of nothing in the record that shows any agreement on prices and materials and conditions of sale to railroads and industrials.

Trial Examiner Norwood: What about this condition here? Are any of these people competitors? Government, railroads, steamship lines and industrials?

Mr. DuBose: Well, railroad, steamship lines and industrials were generally in the same general classification.

They all use them for maintenance purposes. In 4356 other words, the red lead in paint and white lead in oil they would use in keeping up their plants and equipment, and so on. I don't think there is any proof that they use it for any other purposes except in the case sometimes—

Trial Examiner Norwood: Were all of them consumers?

Mr. DuBose: Well, I suppose sometimes the paint manufacturer might be classed as an industrial. Now, he would use the raw product in the grindings of his paint which he would later resell to the public, but here he is not talking about discrimination. He is talking about these agreements. This is what he says was done in 1933,

and we have shown, 1, that it wasn't done before 1933, or 2, that there is no proof of any such agreement and any such inference would be directly contrary to the substantial evidence, or, 3, it found its way into Schedule A, so that the next step became extremely important to counsel for the Commission. He realized he must try to knock out Schedule A, and he does that by an argument which can only be classified as tortuous. Any argument so tortured would raise doubts as to its validity on its face. How does that argument run? First, he says in the Code itself, Article VII.

Trial Examiner Norwood: Is that in his oral argument to me?

4357 Mr. DuBose: Both in this oral argument and in his proposals as we spell out his argument. Article VII contains a trade practice rule for lead pigment differentials, and I am reading from page 337 of Commission Exhibit 809. He says Section 5 merely required filing of prices and differentials from the terms and conditions of sale of Schedule A, and therefore Schedule A didn't have to be followed. Then what is his step to follow it? He says you get no protection from Section 5. Now, Section 5 of the NIRA says: "While this title is in effect, and for sixty days thereafter, any Code agreement or license approved, ascribed or issued and in effect under this title, and any action complying with the provisions thereof taken during such period shall be exempt from the provisions of the anti-trust laws of the United States."

Now, he says, "You weren't even required to follow Section 2 of Article VII, and right there he comes up against his first insuperable barrier. If there was no agreement to follow them even for Code purposes, how can you spell out agreement on any of their basis?"

Secondly, even if there were agreement on those terms and conditions of sale which found their way into Schedule A, it was agreement to include those in the Code. The section, or Schedule A, Section 2, Article VII, and Schedule A is incorporated by reference into Section 2 of
4358 Article 7—was not deleted from the Code. It was not deleted from the Code. They merely obtained an exemption from the mandatory or impliedly mandatory provisions. Again counsel is faced with a second insuperable barrier. If there was nothing mandatory about it, there couldn't have been any agreement to follow.

Now, why did they get an exemption?

Trial Examiner Norwood: Do you think they couldn't agree to follow it in case they weren't forced to follow?

Mr. DuBose: There could be outside of that, yes, but what does the record show? In the code meetings they agreed to have this in the Schedule, then when they get up to the Code they get an exemption from it. Why?

The exemption order—it didn't delete the Schedule or the Section, exempted the members of the industry from the provisions of Section 2 of Article VII and Schedule A for a period of three months provided, "that such exemption be granted without prejudice to further extension beyond three months if at the end it shall appear to the Administrator that the industry has been unable to determine it upon either the execution of Section 2 of Article VII and Schedule A—which is a part thereof—or upon the modification thereof.

Now, a further exemption was requested in the fall
4359 of 1934 at the expiration of those three months. Why?

Because the industry "has not yet been able to determine upon the modification of Article VII, Section 2, it desires."

There are two ideas there, on both of which counsel is hooked. If it weren't mandatory, there is no agreement, because the only agreement in the record was to include it for Code purposes, and if they later decided to get an exemption from it, the agreement falls itself. In the second place, regardless of that, it was in the Code, and anyone, whether by common course of action, planned or otherwise, who followed Schedule A was complying with a term or provision of a Code, and specific granted exemptions under it and the anti-trust statutes as provided for in Section 5 of the NIRA.

Trial Examiner Norwood: We will recess for five minutes.

(A short recess was taken.)

4360 Trial Examiner Norwood: Proceed.

Mr. DuBose: In this Part 3 of his proposal, counsel repeatedly refers to a statement which appears in one of the minutes of the meetings, Commission's Exhibit 504-B, where uniform bases for the sale of oxides and dry white lead were being discussed for code purposes. Those eventually became Schedule A, and he attempts to imply and have one infer that the words "that prices were not

mentioned in deference to existing statutes" was used in some cynical or sinister fashion to mean "Well, we have already agreed on prices, why do we have to put them in?"

Then he says, "They were well aware—"

Trial Examiner Norwood: I don't find any part 3. It skips from 2 to 4.

Mr. DuBose: I think part 3 begins on page 13 at the top of the page.

Trial Examiner Norwood: Thank you.

Mr. DuBose: It also says that the manufacturers of lead pigments were well aware of the anti-trust statutes, because they sent Wormser to consult counsel, and then Mr. Carter later wrote to the other respondents.

Well, we say that "in deference to existing statutes" means exactly what the term implies. In other words, they were not going to indulge in price fixing even for code purposes when the sky was the limit, as Mr. Wormser
4361 said, and when almost every other industry, as has been seen in the other cases before the Commission, put in everything that they possibly could in the code to have exactly every price known. Every price had to be reported. If they did not follow the pricing, they were to be cracked down upon by the Administrator.

We knew the NRA was temporary. We were not going to have any price fixing provisions, even in the code, regardless of what these fellows said. Even on price reporting we were reluctant to put in anything. The Administrator put in or suggested and urged the adoption of a section which would practically amount to rigid adherence to filed prices. We didn't even want that, and we redrafted it.

He says that Mr. Carter discussed, in the Fall of 1933, the use of uniform provisions with the others. What does Mr. Carter say in that letter? He says that it was thought that since prices were not mentioned, that in spite of the fact that counsel did not give a go-ahead signal, after discussion, they felt there was nothing wrong in having the privilege of following them, if they wanted to, and what is the proof?

There was only one company, National Lead, which followed any of those in Schedule A before May 1934, and that was only as to dry white lead. We know of no law that prohibits any manufacturer or seller from adopt-
4362 ing any schedule of materials which in themselves

are non-discriminatory or otherwise fair methods of competition.

Would Mr. Cornish, then president of the National Lead, and a lawyer, have made the public statement in July of 1934, Respondent's Exhibit 168, and we quote:

"We feel"—We, National Lead—"that price fixing permits inefficient competitors to enter an industry. For this reason we are glad that none of the N. R. A. associations in which National Lead Company holds memberships provides for price-fixing.

"The suspension of the anti-trust laws, which was effected by the National Industrial Recovery Act, is only temporary in my opinion. When the anti-trust laws return, many companies may again have to learn to operate on an efficient, economical basis."

Would the president of a large concern, who is a lawyer, have made that public statement if he did not sincerely believe, and having known of the code and all of its provisions, that there was nothing in there which in itself contravened the anti-trust statutes?

There is one other thing that deserves comment on this Part 3, and that is the apparent attempt to use this group of documents, Respondent's Exhibit 159-A to J, as a springboard from which to claim that this on its face
4363 shows agreement with other respondents. We say nothing could be further from the fact. In support of that, counsel refers to 159-D, where is was stated:

"All sellers have agreed to discontinue the old 90-day card price contracts. All sellers have agreed." That is what Mr. Rowe told his branch managers. He also refers to the quotation later on on that same page:

"There was a great deal of discussion as to the rule against protection against price decline, and it was finally decided to make a definite rule which was intended to mean that the price to apply on any order is that 'in effect on date order is received'."

Both of those provisions are in Schedule A. He is referring there to Schedule A, Article 1, Terms of sale as to oxides in lots of less than 20 tons. The price there was to be the seller's card or quoted price. There was no protection against decline.

Now, when you come to the 90-day contract, the price was to be seller's card price. Article 1 further provides in Subdivision (B) (7), that shipment shall be made at least within 30 days from the date order is received.

With respect to this provision, which in effect got rid of 90-day contracts, Mr. Rowe said:

"The words 'at least' were put in at the request 4364 of the N. R. A.,"—This is from Respondent's Exhibit 159-D—"which is also responsible for some of the other phraseology in the schedules. Any order taken at the prevailing price must be for shipment within 30 days."

The N. R. A. itself requested that 90-day contracts be discontinued, and it was provided for in Schedule A, and any action complying with that, we say, is protected by Section 5 of the N. I. R. A.

We realize that counsel in this case has been placed in a difficult position, counsel for the Commission. This is the first case that we are aware of where it is not claimed—and there is no proof of any agreement after the termination of N. R. A. to continue the practices.

All the other cases—Deitgen, Malters, Milk and Ice Cream Can, and Ford Howard—proved either agreements before N. R. A. or after or both.

Thus, in the Ford Howard Paper Company case they met a few days after N. R. A. was declared unconstitutional in their association. "The Crepe Paper Association case we agree to continue the practices." A year later they say, "We agree that this shall be our list of prices."

That, we believe, accounts for what we again say is the tortured argument in this case, that we couldn't follow the terms of a code, and the attempt to show by inference, based upon inference and ignoring the re-
4365 liable and substantial documentary evidence that no agreements on anything that was not in Schedule A were ever made.

We believe that this case is the case in which the language of the Circuit Court in the Cement Case Company can aptly be used, and I am quoting from 157 Federal 2d 533 at page 549:

"To hold that members of an industry can be invited and perhaps required by the Government to participate in a program for the general welfare under a promise of immunity, and that evidence of their doings and activities in connection therewith can be used to hold them for a conspiracy would constitute a fraud or perhaps confidence game would be a more appropriate designation."

Counsel to get around that principle, which is more than

equitable estoppel, but is based upon the statute of the N. I. R. A. itself, relies upon the Socony Vacuum case, and he says there the court pointed out how you could obtain exemption by putting it in the code and getting it approved, which we did.

But let us look at the Socony Vacuum case. What were they doing there? They were buying distress gasoline in the Texas and Midcontinent area for the practically admitted purpose of keeping the retail prices of gasoline up in the midwest. With this hot oil coming in there, it
4366 would have destroyed their price structure. While they urged acquiescence on the part of the N. R. A. officials, actually the record shows that after the Schechter decision on May 27, 1935, and with that in mind, the Tank Car Stabilization Committee of the respondents in that case, the oil producers, held a meeting at which is was decided that the buying program should continue, and thereafter the committee continued to meet each month to set up these powers. That is after the N. R. A. appeared, and that is referred to at 310 U. S. 185. That is a wholly different situation.

That brings counsel down to Part 4. He now says there is an illegal conspiracy, because you did these things, and in spite of the fact that the N. R. A. urged you to do it, you got it in your code. You don't obtain the benefit of an exemption. But he does not claim that there is any agreement among any of the respondents after N. R. A. He could hardly make such a claim. When N. R. A. was ended, the code authority of the Lead Industries Association, which is composed of the executive Committee and the chairman of the various divisions like Lead Pigment, Metallic Lead, and so on, met and wound up its affairs, returned the labor statistics in the fall of '35, as Mr. Ewing pointed out, when Berry, who had the resounding title of Coordinator of Industrial Cooperation, wanted to get the lead industry down in Washington to discuss voluntary following of N. R. A., they said nothing doing.
4367 No exclaiming, of course, no meeting of the respondents after N. R. A. But he says National Lead, on June 6, 1935, by its executive committee, says that the termination of N. R. A. does not require any changes in our practices. Why not? No order, that I know of, ever issued by the Federal Trade Commission in a case of this sort has prohibited anything but a planned or agreed-to course of action.

That shows on its face that National Lead itself, in general, was going to follow these terms and conditions of sale as a matter of individual choice. They didn't wait to talk to anybody else. They said, "We don't think there was any price fixing in this business we had before, and we think we are going to follow it. We know of nothing illegal in that. And, as a matter of fact, there hasn't been rigid adherence to that, as Mr. Carter and Mr. Merson testified.

Certain provisions of Schedule A have not been followed as a matter of general company policy. The same way with Eagle Picher. They have not adhered rigidly to that program. They have made certain exceptions.

On page 29 of his proposals, counsel tacitly admits that what he calls "the considerable dissimilarity in offered prices" on bids by the respondents and others to governmental agencies, might be some evidence of substantial competition, but he says, "Even if such were the case, the price difference as to one particular type of customer 4368 does not detract from a conspiracy as found."

Well, we have quoted from those government bids on pages 40 to 42 of our proposals. We have shown the quantities involved. We have shown that those bids, on their face, are all over the lot. If these respondents were going to try to fix up a price fixing conspiracy and adhere to it, how can that action on those big bids be explained?

As the Court in the Cement case said, if they were conspirators, they were a queer lot of conspirators.

Now, sales to government agencies are not governed by the Clayton Act, Section 2-A, as amended by the Robinson-Patman Act. Everyone knows that. So, where you don't have that Robinson-Patman Act language hanging over your head, and you have these big bids coming in, which may mean the difference between keeping up your plants to full capacity or not, you have got them bidding all over the lot. If they started bidding all over the lot in these other sales of pigments, which would be governed by the Robinson-Patman Act, someone in Cleveland may say, "Hey, how about this? You are selling in Cleveland at this price." And we say, "Well, we thought we might get the business." The Robinson-Patman Act acts to promote a certain rigidity.

We have a low margin of profit, and it is curious to note that on page 41 of this proposal, while complaining of the

dealer-agent differential, and while stating that white
4369 lead in oil was a low margin product, on the same page, under a different heading, Effects of Respondent's Practices, counsel says, "Well, the effects are to keep the prices of lead pigments at levels above those that would prevail were it not for such combination."

Now, it is perfectly obvious that you can't have both. Look at this case. You have got a pig lead floor. You have got a narrow margin in every one of the products between pig lead and the finished product.

National Lead for years had been the market leader. These other fellows felt the squeeze. Sometimes they tried to put out a shoddy product, and they found they couldn't get away with that. They tried to improve their methods of manufacture, and that cost something. As McNair said, it costs a million dollars to build a decent white lead plant of good capacity. They found themselves in a squeeze there between the ceiling of our price—because certainly they couldn't sell at prices above Dutch Boy—and the narrow margin between that and the floor of pig lead.

We say that this case demonstrates on its face that for years the market leader has been a conservative and beneficial influence in the industry.

Now, when we get to discrimination, so-called, in Count 2, as we see, the counsel claims four specific things: 1. The quantities differential in oxides; 2. The practice of
4370 selling dry white lead throughout this big zone which extends all over the United States except for those Pacific Coast States; 3. The zones themselves in white lead in oil, and running throughout all three of those, of course, is the mill net theory, or, as counsel now calls it, net shipping point, but I don't think that changes the theory. The fourth element of discrimination claimed by counsel applies only to National Lead. That is its alleged customer classification between dealers and agents. Well, now, to support the quantities differentials on oxides, counsel relies upon the testimony of battery manufacturers. Some said, "Sure, it would be of advantage to us from a competitively standpoint to save five to ten cents a battery."

What did others say? It wouldn't make a bit of difference. In the first place, we believe that the testimony that a saving of five or ten cents per battery would be of advantage to a competitor does not show either the tendency or the fact of substantial lessening of competition,

and we say that the testimony of such battery manufacturers as did so testify was not even as strong as the evidence that was thrown out in the Morton Salt case by the Circuit Court, 7th Circuit, in *Morton Salt* against *Federal Trade Commission,* 162 Federal 2d 29.

We say even if that tended to show substantial lessening of competition, counsel, who called all the battery
4371 manufacturers except one, Mitchel, called by Eagle Picher, can't say, "Well, I am going to pick out these that I want and forget about the others." It is his own evidence, and he has got to support his proposals by the greater weight of the evidence.

Now, in any event, counsel tried to limit most of the battery manufacturers to this price competition that they had in what? A 13-plate low-powered battery that all of them admitted was a loss leader, something they had to make because other people made them. When you get into the premium batteries, the quality batteries, as Mitchel testified, and as the others testified, there are prices all over the lot. Price was not then the determining factor in the majority of batteries. It is quality.

Then we come to dry white lead. The mill net theory there is the only thing they had. As far as quantity differentials on dry white lead are concerned, our witness, Owens, by his charts and his figures, fully substantiated the difference of 25 cents in the cost of delivery and invoicing and of sale alone.

Now, what does he show in dry white lead? Well, they are paint manufacturers. They are the largest buyers of the dry white lead basic carbonate. All of those that testified operated in the par zone. As a matter of fact, no paint manufacturer in the east or midwest would probably
4372 go into those Pacific Coast States, so for practical purposes you practically have the mill net theory working in all the United States up to the Pacific Coast.

Well, we just say that mill net is not the way to define price. Price is what the buyer and the seller agree upon to pay for something for delivery to a certain point, and in addition to the Staley case, from which Mr. Hinds, I believe, quoted the other day, we would like to call your Honor's attention to this statement from the Senate Committee report of February 3, 1936, which we quote on page 45.

Trial Examiner Norwood: I am familiar with that.

Mr. DuBose: And in addition, the witness Vasterling showed why paint manufacturers want a flat delivered price. At first glance, someone might say, "Well, that testimony looks funny." But examine it. These paint manufacturers, even those that testified in St. Louis went all over the country into Texas and Louisiana and Georgia, some of them even as far as lower Alabama, and manufacturers in Kansas City, competing with manufacturers in St. Louis, want to be put on an equal basis. They don't think it is discriminatory. They don't want to be punished because of their location, because of a disadvantage on freight, which is in counsel's theory.

They don't want to be penalized for that accident of location.

4373 Can the Commission or any administrative agency compel an industry, regardless of merits of the law, to follow a system which purchasers don't want?

Now, in white lead in oil zones, he says the same shipping point, net shipping point theory applies, and we say that is absurd as a matter of law.

Counsel also states that you can't justify differentials from zone to zone on an average freight cost basis.

Well, on that we respectfully submit that justifying those different prices from zone to zone on an average basis comes strictly within the proviso, because it is making due allowance for differences in the cost of sale or delivery resulting from the differing methods in which such commodities are to such purchasers sold or delivered.

The zone method is just such a method as to come within that proviso, and the only way you can justify such a method is on the average basis.

Trial Examiner Norwood: Making due allowance would be making an adjustment on the basis of the actual freight in shipment.

Mr. DuBose: This is on the basis of actual freight.

Trial Examiner Norwood: And allow for an average for an entire zone.

Mr. DuBose: That is what we claim, that we, by

4374 showing that, come within that proviso in any event, and of course there has been no attempt to show that these differentials, which go up by one-eighth of a cent, have any effect, competitively or might tend substantially to lessen competition. There is no showing of that, nothing from which such an inference could be drawn.

Now, the only other thing deals with the alleged discrimination policy of National between its agents and dealers. The simple answer to that is that in transactions between itself and its agents, the Robinson-Patman Act has no application, that is, in transactions between National and its agents. They are not sales. Title to that white lead in oil remains in National, and the agent sold it for the account of National. It is as though National sold it itself, and National could sell itself to anyone, provided that the general classifications were not competing with each other, and that we clearly showed, I believe.

There is one other thing that we would like to mention just briefly. Counsel apparently urges that an order be entered which, among other things, would, in effect, permanently enjoin National Lead Company from acquiring the stock or assets of any competing concern. There is no thought, so far as we know, in any law or any statute for that proposed order, and in that connection Mr. Justice Frankfurter, in the recent International Salt case, 4375 said in his dissenting opinion that "The Commission is not authorized to make its order needlessly destructive. The baby is not to be thrown out with the bath."

As we see it, there is no present law which prohibits, under any and all circumstances, one competitor from acquiring the assets of another, although there is a certain bill pending that may become law. Under certain circumstances, of course, under the Sherman Act, an injunction can be obtained for some specific acquisition, but never has there been any permanent ban that will run forever against a competitor under any circumstances acquiring the assets of another. Even as to stock purchases you have got to bring an individual action under Sections 7 and 11, the Clayton Act, and even there the Federal Trade Commission has to show some specific instance that the law has been violated or is about to be violated, and you have to have a special hearing, and of course this case was not brought under those sections.

Just one other thing. Counsel for Sherwin Williams, the other day, quoted from the Standard Fashion Company case, 258 U. S. 346, and counsel for the Commission, although he said he had not checked the case thoroughly, stated that the International Salt case contained a definition of those words, "May tend to substantially lessen

competition," splitting the infinitive, as the statute
4376 does, that the salt case contains a construction of Section 3 of the Clayton Act in those very words in an entirely opposite fashion. I don't believe he is correct there. Of course, in the International Salt case, the practice under attack was making tie-in sales of unpatented articles, and the Court merely held, "It is unreasonable, per se, to foreclose competitors from any substantial market," and further said, "The volume of business affected by these contacts can not be said to be insignificant or insubstantial, and the tendency of the arrangement to accomplishment of monopoly seems obvious."

We say that does not destroy the effectiveness of that definition which was quoted the other day.

Mr. Ewing: That closes what the National Lead has to offer.

Trial Examiner Norwood: Thank you, sir.

Mr. Welch?

Mr. Welch: Do you want to take a five-minute recess before you start hearing from me?

Trial Examiner Norwood: We will take a five-minute recess.

(A short recess was taken.)

4377 Trial Examiner Norwood: Proceed.

Argument by Mr. Welch.

Mr. Welch: Mr. Examiner, I find myself in the very enviable position of being almost a Monday morning quarterback. I have been on the side lines in this case for several years without too much direct participation in it. Consequently I think I have some insight on some of the angles that the others in the heat of passion may have missed, and I would like to take the opportunity to expound on those for a few moments.

Before doing so, I cannot refrain from taking the opportunity to direct a few remarks to this document that I believe is entitled "Proposed Findings and Conclusions" prepared by Mr. Wright.

Now, throughout this case we have heard quite a bit about blended tobacco, blended whiskey—blended paint, even. This document is even more blended than any of those products, so I want to call your Honor's attention—as has already been done by my associate, Mr. DuBose—

to the fact that this document is a combination of a good many things, including the white dog with the black spot on his tail, or vice versa, depending on which way you are looking at the dog, from the north end or the south end—conclusions, argument, generalization, lack of citation, or
what have you. It isn't my understanding that that is
4378 what Rule 21 calls for.

Trial Examiner Norwood: Rule 21 calls for a factual proposal and conclusions, doesn't it?

Mr. Welch: With citations, references and reasons.

Trial Examiner Norwood: It has more citations than Glidden.

Mr. Welch: I have no comment in reply to that, Your Honor.

I call your attention to Item 4 on page 2 where the statement is made that the litharge is sold by the respondents to the battery manufacturing industry, or sometimes referred to in the trade by the respondents as oxides of lead.

Of course, Sherwin Williams doesn't sell oxides to the battery trade, and Mr. Wright in fairness does at some other points in his proposed findings so state, but this is merely cited as an evidence of the generalization and I will cite one or two others and then stop on that thought that we strenuously object to any commitment or agreement on our part inferentially or otherwise that the generalized use of the term "Respondents" describes anything Sherwin Williams did unless there is a specific page citation where it says in black and white that Sherwin Williams did it, and we want that objection to run throughout this entire proceeding.

Now, for another illustration I call your attention
4379 to page 8, down at the bottom of the page, "but is
engaged in the sale of such products to paint and varnish manufacturers and other users."

Well, I looked that up, page 1648, and I found where Mr. Merson did make some reference to the fact that red lead was sold for use in paint manufacture, and Mr. Wright said "And Litharge for varnish?"

Mr. Merson said, "No, not that very much. Red lead for paint."

Then I see this further statement in the paragraph including lithopone. What are the facts about that? Mr. Sprague was testifying at page 2652 and 2653. Mr. Sprague said:

"Oh, yes, they make lithopone." Mr. Wright queried, "Do they market it?" "Not to my knowledge."

Now, is that a justification for this generalized statement talking about competitive products?

It is said here also that Sherwin Williams is a manufacturer and producer of zinc oxide. Well, that just isn't so, because the record shows that Mr. Sprague was being questioned as to whether Sherwin Williams made zinc oxide, and Mr. Sprague said, "Do you mean as distinguished from leaded zinc?"

Mr. Wright said "Yes," and Mr. Sprague said,
4380 "No." He said, "No, they don't make it."

Now, then, we come to page 10 at the top of the page. "The Respondents Eagle Picher and Anaconda do a limited amount of business on the West Coast in states west of the Rocky Mountains."

We contend if any respondent is entitled to an accolade for a small amount of its business in any particular territory, we are entitled to it doubled in space, because our volume is less than every other respondent's volume in every one of the products mentioned, and it has been so indicated on the record repeatedly.

As a matter of fact, Sherwin Williams sells no dry red lead and no litharge on the Pacific Coast at all. In 1941 we sold 318 tons of white lead in oil on the Pacific Coast.

Those items are merely given as illustrations, and in making those statements I can appreciate the difficulties that counsel for the Commission was up against. I understand that—the limitations of time and the number of respondents involved—so I have no criticism from that standpoint.

My sole purpose in making the statement is that by my failure to specifically attack any single use of a general term "Respondents" I do not want to be understood as acceding to that being a proper designation of the activities of my own client.

4381 Now, the first discussion that I note of Mr. Wright's to which I want to call some attention is at 4210 where he refers in 1933 to a system of differential and free delivery points, and that, as shown in the list of differential points appearing in Commission's Exhibit 659-C, literally hundreds, and so on—and he goes on to the next page.

Trial Examiner Norwood: That is in his discussion?

Mr. Welch: That is right.

Now, then, when I go from there I go back to page 11 of his brief, and I find his illustration. There is a reference to Commission's Exhibit 659-O, and he said there there is only one town in each of four said states.

I don't know where he picked those four states, and I don't know why he omitted the great state of Mississippi when he made those selections. But be that as it may, it isn't correct, and I do like to have the record correctly reflect the situation, and I therefore call your Honor's attention to Commission's Exhibit 659-J, the same exhibit but another sub-letter, that is all.

Now, what is this differential—an equalization point system? I think the National Lead people have explained that very clearly as applied to their company. The testimony shows very clearly that as applied to Sherwin Williams it is quite a different thing.

4382 The other companies have differentials and equalization points from which shipments may never be made. They are arbitrarily selected points in various cities.

Sherwin Williams' shipping points are actually factory warehouses in every instance. They are places where we carry warehouse stocks.

Trial Examiner Norwood: Are shipments always made from those stocks?

Mr. Welch: Yes, with the one exception that for convenience purposes, when there is a carload order, rather than ship a carload to a warehouse, and then reload it and reship it, we make up the carload back at the factory point and ship direct.

I will go into some of those later, and at this time if I may interpolate, your Honor, my entire discussion of this subject is on the cuff, so if at any time you have any questions you want to ask, please feel at liberty to do so. It will not interrupt my chain of thought, if there is such.

Trial Examiner Norwood: Thank you.

Mr. Welch: Now, when I look at these cities Mr. Wright has referred to in Alabama, Arkansas, Kentucky and Louisiana, he has one city in each of those states.

Well, in the first place, we say there is no evidence that we used the same system, or that if we did use the same system, we used the same cities. And there is con-

4383 siderable variance in that scope.

As a matter of fact, in New Orleans, Louisiana,

Sherwin Williams at that time had at least 4 stores, not only in New Orleans, but Monroe, Shreveport and Baton Rouge. In Kentucky we had two that were the same, but we had one additional store—we had one in Lexington.

Now, your Honor, that is assuming what the Commission has contended, that is to the effect that exhibits such as 662-C and D represent a list of shipping points, and that Sherwin Williams stands ready and willing to ship from any of those points.

We contend we do not, but even assuming we do—I am willing to assume that for the moment—assuming we do, they are not the same as National's, so how can the general statement be made as to there being industry wide any equalization point system.

Now, just a moment on equalization, that term has been used differently by two different groups in this case. The National people have explained how they use it, that they have an equalization point. If you ship somewhere else, you equalize freight against that point.

We have explained how equalization is used in the Sherwin Williams setup, and it is simply this: a lot of people apparently throughout this case have thought there was a lot of hocus-pocus and legerdemain about it, but
4384 it isn't that at all, and I will go back to the original example that we used.

We have a man from Union, Mississippi. We have a warehouse in New Orleans, Louisiana. We have a warehouse in Dallas, Texas. The one in Dallas, Texas is a much larger and more complete warehouse than New Orleans.

We look up the rates when the man from Union wants to buy from us, and we find we can ship from Dallas to Union cheaper than we can ship from New Orleans to Union. Now, that doesn't stand to reason. It is silly. It shouldn't be, but we didn't do it—the Interstate Commerce Commission did that. They set those rates.

The purchaser was shipped from Dallas, but he got the advantage of the Dallas rate, and the witness has testified repeatedly that in no instafice of equalization did the man pay any more than he would have paid had he received his products from his ordinary shipping point.

Trial Examiner Norwood: You have cited in that connection Respondent's Exhibit 205, wasn't it?

Mr. Welch: I believe that was one of the numbers, Your Honor.

Now, basically to get down to Sherwin Williams' position in this case, the two basic positions that we take are these: The first is about the zone system. As to that we say simply that Sherwin Williams—and I am referring now to the keg products, any item sold in containers of a hundred pounds or less—didn't have a zone system. We didn't have the zone system because we used a shipping point system, and by that I don't mean the same thing that some of the other respondents mean when they say equalization point.

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We actually shipped from the places that we called shipping points. They were that in fact, and that is where the goods came from.

With certain exceptions, the shipments from that shipping point to the ultimate distination carried their full freight, and not a nickel more and not a nickel less. There was a general offer to sell FOB certain shipping points, and that offer was adhered to, and it was so stipulated in the record that we did.

Trial Examiner Norwood: Were your delivery prices at the shipping points the same as the zone prices of the Respondents?

Mr. Welch: Your Honor, I went to considerable effort in my proposals to demonstrate beyond all doubt that that was not a fact, and that was the second point I wanted to raise.

Trial Examiner Norwood: Go ahead.

Mr. Welch: That if you deny our contention that we don't operate on a zone system, and admitting for the purpose of this argument that we did, it is so different from the others that you wouldn't recognize it, price-wise, and in several other respects which I have set out fully, and I don't think it is necessary to take your time to repeat them except I can say this briefly: Take the eight western states. In the East we had as much as a dollar and a half variance between dry white lead, white lead in oil, dry red lead and litharge.

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On the west coast they are all the same, and actually—I mean that—they were all the same price, though in the East there was as much as a dollar and a half variance between them.

In the West, Sherwin Williams red lead in oil was a dollar a hundred pounds higher—less than the difference between it and other products in the East.

Sherwin Williams pricing structure is such—and it is demonstrated in these proposed findings—without regard to National's position of selling to both dealers and agents, Sherwin Williams' price was different from that National offered to either category, and that was consistently true.

Now, that isn't an idle statement that Sherwin Williams has made predicated merely upon the presence in evidence here of price card information. That is taken from invoices, and I have tabulated that. The long tabulation
4387 was put in by Commission's counsel to show substantial adherence to those price structures, and they do not correspond to the ones set out in subparagraph A of paragraph 8 of Count 1 of the Complaint.

It is like a cross-word puzzle. Sometimes it just won't add up, and this one doesn't. The figures just don't match anybody else's. Why? I think that is pretty easy. Sherwin Williams covers the earth in paint. We are highly competitive with the lead industry. We are not interested in selling lead particularly. It is merely a line that is carried to fill out our line with our dealers so that when painters come in and insist on having lead in oil or dry lead, rather than a ready-mixed paint, they can get it.

Price is not important to us. We set our own price on our own system and schedule, and we held out for it and got it, and the invoices show we got it.

Now, then, coming to dry white lead, we are accused of having done some very reprehensible things there. Maybe we did, but this record doesn't show it. It just hasn't been proved.

You know, this new rule that we have has just recently come into effect, and I was quite interested in it, having been a former Commission employee, and I approached my proposals from the standpoint that I thought
4388 most Commissioners would approach them and as I have probably approached them before.

How much do I have to have? It is in there? Can I get it? Can I squeeze it out?

It can't be done. It can't be squeezed out of this record because it just isn't there. The cow is completely dry—no cream, not even any bluejohn.

The same thing applies, coming to the oxides. Here is the setup, Map No. 3, carload, red lead and litharge zone map, and the only thing I know about carloads of litharge and red lead is contained in a very simple little stipulation

which says, "Sherwin Williams does not do business in these products on the Pacific Coast. Company officials do not now have any information that carload shipments of red lead or litharge are made to any point in differential territories except shipments to Sherwin Williams' own plants."

Plants is different from branches or from warehouses. We use that product in our own plants in manufacturing paints, and we ship to those plants in what has been described in the complaint as differential territories.

There is not one single scintilla of evidence in this case that Sherwin Williams ever sold one single carload of red lead or litharge in the territories described as differential territories.

4389 I can't say any more than that. Once I have said that, there is no point in my discussing the differential territories, who designed them, how they operated, or what they did with them because I have never gotten to that point.

They have never proved that we operated any business in those areas, so why are we concerned with them?

Of course the two primary factors in this conspiracy angle of the case are the agency plan and the zones. Well, admittedly we have nothing to do with the agency plan. Everybody admits that. They admitted it at the time, and there was a fight going on, and it was obvious, between the paint people who were trying to bring the lead people under their code, and the lead people saying, "We will have nothing to do with you."

Unfortunately Sherwin Williams was in a position where they did to some extent have to be in both industries, though of course obviously their heart was in the paint industry, and when the proposition of agencies and consignments was broached, Sherwin Williams says, "We will have no part of it", and never did. That is Number One.

Number Two is the zones. We say we have no part of that. Now, there is a statement in here—I was much surprised—to the effect that before these famous agreements were reached in 1933 there weren't any quantity dis-
4390 counts. Well, I looked at the Sherwin Williams price card for January 6, 1933, six months before the first meeting. I find quantity discounts, 500 pound orders, ton orders, five ton orders, carload orders. On what product? White lead in oil, dry white lead, dry red lead, dry litharge.

I don't know what the other people were doing, but here is this general statement that I find in these proposals submitted by the Commission to the effect that there weren't any quantity discounts in those products before these famous or infamous meetings of 1933 took place.

Well, of course, I don't know how seriously counsel for the Commission is taking the position that the respondents in this case are in a position to influence, if not force, a certain retail price on their items.

Well, some of them did have fair trade contracts in certain States. Obviously, that is not against the law, if they do it individually, but as far as Sherwin Williams is concerned, it never had them in any State. There is a statement on Sherwin Williams' price cards which says, "Sherwin Williams suggested retail prices," but there isn't a line of testimony from any dealer that he was ever in any way criticized for not adhering to those prices, if he did not; that any line was taken away from him; that he was refused the poducts when he ordered them, or that any other policing activity ever took place.

4391 Of course, we controlled the retail prices in stores we owned. Remember, Sherwin Williams is in a different position than these other respondents in that we have over 300 stores located throughout the United States where we sell to people such as the Examiner, counsel for the Commission, and counsel for Sherwin Williams, who goes and buys direct from Sherwin Williams a pint, a quart or a gallon of paint or white lead or litharge or whatever product he may want, and of course we control those prices.

There is no law that can prohibit us from doing that.

Now, coming to Count 2 and this matter of discriminations, I must confess that I have had many a sleepless night about this case. I feel somewhat in the position of the man who at one time had a medical case down here before the Commission and the Commission stopped him from representing anything at all about his product, so he ended up with it in a great big beautiful bottle with a great big star on it, and all it said was, "Cited by the Federal Trade Commission."

Is that what is going to happen out of this case, if the order proposed by counsel for the Commission is the result? That has worried me for no little bit, because despite the fact that I am now on the outside, I do have regard for the Commission, for the Commission's proce-

dures, and for its effective control over monopolistic practices. But by the eternal Gods, I don't like to see the
4392 Commission confirm one and give it a certified copy of a degree, saying to any respondent here, "You take nine-tenths of the United States and leave the rest for the little suckers."
4393 I don't know whether the Commission will see it. I don't know. But it is so simple.

Of course, it is stated here in the findings very adroitly —these proposed drafts—about how Chicago has an advantage over other plants in one of these fields. Very interesting, but every other plant except the one in Chicago, and including Chicago, is controlled by one of the respondents, and then we are met with the proposition that there is a reciprocal giving up of territorial advantages. Why, that is sheer poppy-cock. We have got nothing to give up. We are hanging on by the skin of our teeth and always have been.

Your Honor, I feel very seriously about the effect, the possible effect if there should come out of this case an order saying, "You can realize only a uniform mill net on your products because"—and I think these two simple little maps, and I kept them as simple as I could because I thought by their very simplicity they might demonstrate to the Commission the serious economic possibilities that might flow, might or will necessarily flow, they can't do otherwise. Here is National, nine oxide plants, five white lead plants. You talk to me about reciprocal giving up of territorial advantages? There just aren't any such.
4394 Your Honor, that is about all, with one exception, and that is that I think throughout this whole case, broadly speaking, there has been a complete failure of proof in so far as Sherwin-Williams is concerned. What do I mean by that? I mean by that that I think it is still the law—of course, it has been changed very considerably, but I think it is still the law that the Commission has to prove something about some competitive effect, and that has not been done. Battery manufacturers? Sure. Sherwin-Williams did not sell to the battery trade. Paint manufacturers? Dry white lead? Yes. Is there any showing that Sherwin-Williams sold white lead to any one of them or to any one of their competitors? Not a line, not a line. There is one statement by Mr. Merson that Sherwin-Williams sells red lead for use in paint, but there isn't anything about

white lead. There is not one line in this 4,000 page record showing anything about the effect of any practices in so far as Sherwin-Williams is concerned in selling its products.

Now, as I stated in my proposals, I don't care if five cents a battery or ten cents a battery does make a vital difference in the battery business. Maybe it does, but that has nothing whatever to do with what difference or lack of difference it would make in some other industry, particularly when we bear in mind the fact that Sherwin-Williams' own price announcements show that we are primarily
4395 selling maintenance accounts, railroads, steamship lines, apartment houses, industrial concerns. They are not making a product they are requesting to sell out of the product they buy from us. They are merely keeping up their equipment.

It seems to me that with that being the situation it is almost impossible—and perhaps that is why it wasn't done—almost impossible to prove any competitive effect in the respective lines of business of the concerns making the purchases. Oh, yes, the argument that I will be met with is what about your own line? My answer to that is that any concern whose business is one per cent or less can have very little effect, competitively or otherwise, on the business of anyone else. Thank you, sir.

Trial Examiner Norwood: Mr. Wright.

Mr. Wright: May we go off the record here?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Mr. Welch: It is now rather late in the day, and I am not going to be able to cover a reply to all of the statements by Mr. Hinds, Mr. Gardiner, Mr. Ewing, Mr. DuBose, Mr. Welch and Mr. Wood in the time remaining today. I understand that counsel want to return to their offices, so if that is agreeable with counsel and with the examiner, I will file as quickly as possible a statement in lieu of my oral reply to the arguments of counsel.

4396 Mr. Ewing: That is certainly agreeable to all counsel for the respondents.

Trial Examiner Norwood: Counsel may do that, and we have a clear understanding then about filing any additional proposals between now and the 25th. I will ask counsel to send those in, in whole or in part, as soon as they can. The quicker you send it the more help it will be to me.

Now, there is nothing further, I understand, so the case is now closed.

Mr. Welch: Your Honor, just one second. Corrections to the record. I don't believe they have been disposed of.

Trial Examiner Norwood: Do you have any statements of corrections for the record?

Mr. Wright: Can we attempt to get together with counsel? It will not be necessary for Your Honor to hold a hearing, I don't think. We will get an informal agreement between ourselves on that, and submit that matter with the corrections that we are agreed on and any other representations that we might have about those things we might not agree on. I don't think it will be any of those.

Mr. Ewing: I don't think there is a chance of their being disagreement as to the corrections.

Mr. Wright: To you by the 25th of January.

4397 Trial Examiner Norwood: They should be made long before that. You don't contemplate then their being entered on the record in a conference with the rule?

Mr. Wright: It was my thought they could be filed in the form of a statement which would be a part of the record.

Trial Examiner Norwood: The Commission's rule is that those corrections be in the record proper, and appearing at the last hearing so that everybody will know just where to turn to find out what the corrections are that have been made.

Mr. Wright: If that is the case, Your Honor, could we then set a hearing for the 25th for the limited purpose of inserting in the record the corrections that we can agree on, and it will not be necessary for any counsel except those local counsel here to attend that.

Trial Examiner Norwood: Not on the 24th, 25th or 26th of January, because I will have my report well under way by that time. We have to close the case and then the docket transmits to me the entire record so that I can go to work on the report, and I can't delay that any longer. I suppose in the emergency you may submit the agreed list to me and I can approve them all and file them in the record.

Mr. Wright: I should think that would be satisfactory, because this presupposes that we will all be in agreement on what they are, and none of us will urge anything

4398 inconsistent.

Mr. Ewing: I can't conceive of there being any disagreement.

Trial Examiner Norwood: There is nothing to prevent my approval of these corrections after the case has been closed, so with that understanding that you will submit to me agreed lists of corrections to the record, which I will allow in whole or in part, as appears just and proper, and I will have those filed in the record, and with that understanding the case is now closed. Within thirty days, or such further time as may be necessary, I will file my report and recommend a decision to the Commission. Counsel, under the rule, will have the stated number of days to file their briefs and serve them on each other. I refer you to the rule on that.

The hearing is adjourned sine die.

(Whereupon, at four o'clock p.m., the hearing was adjourned.)